TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 261

THE ST. LOUIS AND EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF JAMES HAGERMAN, JR., COLLECTOR OF THE CITY OF ST. LOUIS, IN THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

[redacted]

(27,506)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 751.

THE ST. LOUIS AND EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF JAMES HAGERMAN, JR., COLLECTOR OF THE CITY OF ST. LOUIS, IN THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1920.

1 UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that, heretofore, to-wit, on the 28th day of February, 1917, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause between The State of Missouri, at the relation and to the use of James Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri, Respondent, vs. St. Louis & East St. Louis Electric Railway Company, a Corporation, Appellant, No. 20,171, a certified transcript of the judgment of the Circuit Court of the City of St. Louis in said cause, and of the order of said Circuit Court granting an appeal from said judgment to the Supreme Court of the State of Missouri; which said transcript of said judgment and of said order granting an appeal is in the words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered that heretofore, to-wit, at the December Term, nineteen hundred and sixteen of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the twenty-second day of December, 1916, it being the sixth day of the December Term, 1916, of said Court, the following proceedings were had in cause No. 8027, Series "B" of the causes in said Court, wherein State ex rel. and to the use of James Hagerman, Jr., Collector of the Revenue for the City of St. Louis in the State of Missouri, is plaintiff, and St. Louis & East St. Louis Electric Railway Company, a corporation, is defendant, to-wit:

2 Friday, December 22nd, 1916.

8027.

STATE ex Rel. and to the Use of JAMES HAGERMAN, Jr., Collector of the Revenue for the City of St. Louis, in the State of Missouri,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation.

This cause having heretofore, to-wit: on the 13th day of September, 1915, been submitted to the Court by the parties hereto upon the agreed statement of facts, filed January 14th, 1915, the stipulation for submission of cause, filed September 4th, 1915, and the arguments of counsel for the respective parties hereto, a jury having

been waived and the Court being now, at this day, fully advised of and concerning the premises doth find the issues joined in favor of the plaintiff and against the defendant and doth find that the defendant is indebted to the plaintiff for State, City, School, Library and Art Museum taxes for the year 1907, in the sum of $4,036.63, together with a penalty of 1% per month from January 1st, 1908 (8 years 11 months) amounting to $4,319.56, making in the aggregate the sum of $8,356.19, and an attorney fee of 5%, amounting to $201.83, to be taxed as costs.

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant the aggregate debt aforesaid, to-wit: the sum of $8,356.19, together with the costs of this suit and that execution issue therefor. It is further considered and adjudged by the Court that the plaintiff be, and is hereby allowed an attorney fee of $201.83, to be taxed as costs in this cause.

Declarations of law given, modified and given and refused, filed. Memorandum filed.

3 And at the said December Term, 1916, of said Court, the following further proceedings were had in said cause, to-wit:

Thursday, January 25th, 1917.

8027.

STATE ex Rel. and to the Use of JAMES HAGERMAN, JR., Collector of the Revenue for the City of St. Louis, in the State of Missouri,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation.

Now, at this day, upon motion, by attorney, and for good cause shown the Court doth grant the defendant 30 days' additional time within which to file its bill of exceptions herein; thereupon, defendant files and presents to the Court an affidavit for appeal and an appeal bond conditioned according to law in the penal sum of $17,116.04, with the American Surety Company of New York, as surety, and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined said bond and affidavit for appeal doth approve said bond and order the same filed, which is accordingly done, and doth order that an appeal be, and is hereby allowed the defendant to the Supreme Court of Missouri from the judgment or decision of the Court, heretofore rendered herein.

And at the said December Term, 1916, and on February 1st, 1917, it being the thirty-sixth day of the December Term, 1916, of said Court, the following further proceedings were had in said cause, to-wit:

Thursday, February 1st, 1917.

4 8027.

STATE ex Rel. and to the Use of JAMES HAGERMAN, Jr., Collector of the Revenue for the City of St. Louis, in the State of Missouri.

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation.

The Court having duly considered the plaintiff's motion filed January 6th, 1917, and heretofore submitted to re-tax costs and to increase the allowance for attorney's fees, together with the proof adduced in support thereof, doth order and adjudge that said motion be, and is hereby sustained; that the order entered in this cause December 22nd, 1915, allowing the plaintiff an attorney fee of 5%, amounting to $201.83, be set aside and vacated and that the Messrs. Thomas Rutledge and J. M. Lashly, attorneys of record for the plaintiff, be and are hereby allowed a reasonable attorneys' fee, to-wit: the sum of $1,000.00, for bringing and conducting this suit, which shall be taxed against the defendant and paid as other costs in this cause, with leave to plaintiff to petition the Court later for additional fees in the event that further services are rendered.

And at the said December Term, 1916, of said Court, the following further proceedings were had in said cause, to-wit:

Friday, February 2nd, 1917.

8027.

STATE ex Rel. and to the Use of JAMES HAGERMAN, Jr., Collector of the Revenue for the City of St. Louis, in the State of Missouri.

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation.

5 Now, at this day, comes the defendant, by its attorney, and files and submits to the Court its motion to set aside the order sustaining plaintiff's motion to re-tax costs and allowing plaintiff $1,000.00 as attorney's fees, and to grant it a new trial thereon; and the Court having duly considered said motion doth order that the same be, and is hereby overruled; thereupon, said defendant filed and presents to the Court an affidavit for appeal from the action and order of the Court sustaining plaintiff's motion to re-tax costs; and the Court having seen and examined said affi-

davit doth order that an appeal be, and is hereby allowed said defendant to the Supreme Court of Missouri from the judgment and decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify that the above and foregoing contains a full, true and complete transcript of the judgment in the above entitled cause, showing the term, day of the term, month and year in which the same was rendered, and also of the order granting an appeal in said cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 13th day of February, 1917.

[SEAL.] NAT GOLDSTEIN,
Clerk Circuit Court.

6 And thereafter, on April 17, 1919, the said appellant filed its abstract of the record in said cause, which said abstract is in the words and figures following:

In the Supreme Court of Missouri, Division No. 1, April Term, 1919.

No. 20171.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, JR., Collector of the City of St. Louis in the State of Missouri, Respondent.

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellant.

Appeal from the Circuit Court of the City of St. Louis.

Abstract of the Record.

The petition and answer in the above-entitled case is as follows (caption and signatures omitted):

Petition.

The State of Missouri, suing at the relation and to the use of the Collector of the Revenue within and for the City of St. Louis,
7 in the State of Missouri, alleges that James Hagerman, Jr., is the legally qualified and acting Collector of the Revenue within and for the City and State aforesaid; that defendant is a corporation organized and existing according to law, and is engaged

in the business of operating and conducting an electric railway for the carrying and transportation of passengers in the City of St. Louis, State of Missouri; that on the 1st day of June, 1906, said defendant was the owner of the following railroad property in the City of St. Louis and State of Missouri, to wit:

First. Three hundred and forty-six one-thousandths (346/1000) miles of roadbed and superstructure.

Second. Rolling stock and "all other property mentioned in Laws 1901, Section 2, p. 232".

All of which property was then and there subject to taxation for state, city, school, library and art museum purposes; that there was legally assessed and levied against said property, in the year 1907, for state, school, city, public library and art museum purposes, the aggregate sum of forty hundred and thirty-six dollars and sixty-three cents ($4,036.63); that of the taxes so assessed and levied, there is now due, for state revenue purposes, the sum of two hundred and seventy-nine dollars and three cents ($279.03); for state interest purposes the sum of thirty-seven dollars and twenty cents ($37.20); for school purposes the sum of ten hundred and twenty-three dollars and eleven cents ($1,023.11); for city purposes the sum of twenty-five hundred and eighty-five dollars and sixty-eight cents ($2,585.68); for public library purposes the sum of seventy-four dollars and forty-one cents ($74.41); for art museum purposes the sum of thirty-seven dollars and twenty cents ($37.20); amounting, in the aggregate, to the sum of forty hundred and thirty-six dollars and sixty-three cents ($4,036.63) as aforesaid; which sum the defendant has failed to pay, as required by law; that plaintiff is entitled to recover of defendant a penalty of one per cent (1%) per month on the full amount of said taxes so due and unpaid from the 1st day of January, A. D. 1908, until the same shall be paid.

Plaintiff further says that the taxes so assessed and levied are, by virtue of the laws of this State a prior lien upon said roadbed and other property.

Wherefore, plaintiff prays judgment for the said sum of forty hundred and thirty-six dollars and sixty-three cents ($4036.63), and the penalty thereon until the same shall be paid, and for reasonable attorneys' fees and costs of suit, and that the same be declared a lien in favor of the State of Missouri, and that said lien be enforced, and said roadbed and other property, or so much thereof as may be necessary, be sold to satisfy said judgment and costs, and that a special fieri facias be issued against said property.

Answer.

(Caption Omitted.)

Now comes the defendant in the above-entitled cause and for answer to the plaintiff's petition admits that James Hagerman,

Jr., was at the time of bringing this suit, the legally qualified and acting Collector of the Revenue within and for the City of St. Louis, and State of Missouri, and that the defendant was and is a corporation, organized and existing under and by virtue of the
9 laws of the State of Missouri, but excepting the above admissions, defendant denies each and every allegation in said petition contained.

And further answering, the defendant says that at no time since its incorporation, which was long prior to the year 1906, has it been engaged in the business of carrying or transporting passengers from one place in the City of St. Louis, Missouri, to another place in said City of St. Louis, Missouri, or from any place in the State of Missouri, to another place in the State of Missouri.

That it was not on the first day of June, 1906, the owner of any railroad property in the City of St. Louis, Missouri, or in the State of Missouri, which was used as such for doing any business as a common carrier wholly within said State of Missouri, and it has never occupied for railroad purposes any streets, alleys or property of the said City of St. Louis, under any franchise granted by the City of St. Louis, or otherwise.

That on the 26th day of July, 1889, defendant entered into a contract with the St. Louis Bridge Company and the Missouri Pacific Railway Company and the Wabash, St. Louis & Pacific Railroad Company, owners and lessees respectively of a toll bridge erected under an act of Congress of the United States and extending from the said City of St. Louis, Missouri, to the City of East St. Louis, Illinois, over the Mississippi River, a navigable stream, and known as the Eads Bridge, under and by virtue of which agreement, this defendant for a certain division of the fare to be paid by bridge passengers for riding across said bridge ran electric trolley cars between the termini of and over and across said bridge on
10 tracks laid only on the upper or foot and wagon roadway of said Eads Bridge and owned by said Bridge Company.

That said contract was in the nature of a license for a term of fifteen years from date thereof, and all of the defendant's property of every kind or character was used solely as a means in transacting, procuring and increasing interstate transportation or commerce between said states of Missouri and Illinois across said Eads Bridge. That during the life of said license agreement and before June 1st, 1906, the defendant's said licensors, by agreement, assigned the lease of said Eads Bridge and general properties of the St. Louis Bridge Company to said Missouri Pacific and Wabash Railroad Companies, and all renewals and extensions thereof over to the Terminal Railroad Association of St. Louis. That on April 11, 1902, defendant's said license contract, of date July 26th, 1889, was canceled, determined and for naught held and there was substituted therefor an agreement by and between the Terminal Railroad Association of St. Louis, party of the first part, designated "Terminal Company"; the St. Louis & East St. Louis Electric Railway Company, party of the second part, designated "Bridge Electric Company"; the East St. Louis Electric Street Railroad Company, a corporation organized

and existing under the laws of the State of Illinois, party of the third part, designated "East St. Louis Company", and the East St. Louis & Suburban Railway Company, a corporation organized and existing under the laws of the State of Illinois, designated "Suburban Company", the securing of street car passenger traffic to cross said river over said bridge being the object and purpose of such agreement. That by said agreement, said Terminal Company
11 granted to defendant company, subject to the contract between the said Terminal Company and the Interstate Transit Company, of January 3, 1902, the exclusive right and privilege to operate (subject however, to the approval of the general manager of said Terminal Company, with right to appeal from his rulings to the board of directors of said Terminal Company, the decision of which board would be final and conclusive upon the "Bridge Electric Company") for passenger traffic only an electric street car over the upper roadbed of said bridge, during the life of said contract, to wit, the term of fifty years from date thereof unless sooner terminated by said Terminal Company as therein provided.

That said Terminal Company agrees therein to reconstruct and at all times maintain in proper condition the tracks and roadway and the supports thereof.

That under said agreement, this defendant for a certain division of the fare of not less than five cents nor more than ten cents per passenger as determined by said Terminal Company to be paid by bridge passengers for riding across said bridge, caused electric cars to be run between the termini of and over and across said bridge on said Bridge Company's tracks and upper roadway of said Eads Bridge.

That under said agreement, said second, third and fourth parties are made to agree with each other and with the Terminal Company to so operate as to direct travel destined to pass by way of said East St. Louis to or from the said City of St. Louis exclusively to said Eads Bridge, and for refusal or inability or failure upon the part of any one of the parties of the second, third or fourth parts to faithfully perform or discharge any obligation assumed in said agree-
12 ment, the said Terminal Company reserves the right to declare said agreement terminated and canceled. That said contract is in the nature of a revocable license and all of defendant's property of every kind or character was and is used solely as a means in transacting, procuring and increasing interstate transportation or commerce between the said cities of Missouri and Illinois across said Eads Bridge and is not legally taxable by the State of Missouri.

That defendant did not at the times in question and does not now own any railroad property or operate any railroad or do any business as a common carrier except as hereinbefore stated, and that said business is wholly upon and confined to the said Eads Bridge, and all of defendant's said property and efforts are used solely as a means in transacting and increasing interstate commerce, and are incident to interstate commerce and constitute interstate commerce merely. And defendant denies that the property named in the petition was

on the first day of June, 1906, or at any time, subject to taxation in the hands of this defendant for state, city, school or other purposes.

II.

And further answering, defendant says that if said State Board of Equalization has power or jurisdiction to assess for taxation for the State of Missouri any of defendant's property of any kind or character, which defendant denies, and does not intend hereby to admit, nevertheless the attempted assessment of 1907, for taxes for the year 1907, upon which this suit is based, was not and is not in ac-
13 cordance with the laws of Missouri, and is invalid, null and void and insufficient to support this action.

(*a*) That the attempted assessment in the year 1907 for taxes for the year 1907, does not represent the judgment or discretion of the State Board in placing their valuation upon defendant's supposed property or any more increase or enhanced value thereof; that in the year 1898, said State Board of Equalization on the supposition that the length of defendant's road in Missouri was .50 miles instead of .346 miles as supposed by them in the year 1907, and on the supposition that defendant owned the same rolling stock and miscellaneous property as supposed by the State Board in 1907 to be owned by said defendant for the year 1907, except $26,524.55 money on hand or in bank, valued all of said property of the defendant in the State of Missouri at a total valuation for taxes for the year 1898 of $8,300.00 as against a total valuation in 1907 of $185,019.98 for taxation for the year 1907 of the same property.

(*b*) That if the attempted assessment in 1907 for the year 1907 includes the said board's valuation of supposed franchises of the defendant company, and the taxes herein sued for are predicated upon and based and extended upon the value of such supposed franchises, then it is invalid and cannot be collected. First, because the defendant had no special privileges granted to it by the City of St. Louis or State of Missouri, and never has exercised any franchises, except the franchise to be a corporation, which the laws of Missouri expressly exempt from taxation. Second, because defendant has never owned or used any property or done any business except under and by vir-
tue of said license from said St. Louis Bridge Company and
14 its said lessees and assignee, which license was so owned and used solely in carrying on interstate commerce and as a means in transacting interstate commerce and as an incident to, and as a means in procuring and increasing interstate transportation or commerce between said states of Missouri and Illinois over and across said Eads Bridge.

And defendant avers that the State Board of Equalization in the year 1907 did not cause to be kept a fair and full record of all its proceedings and decisions respecting its valuations and reassessment for taxes for the year 1900 and for taxes for the year 1899, and of the valuation and assessment of substantially the same identical property for taxation for the year 1907, as required by law and particu-

larly by Section 9358 of the R. S. of 1899, being Section 11577 of the Revision of 1909, and said proceedings are illegal and will not support the levy and collection attempted in this suit.

(c) That the said Eads Bridge upon which defendant's business is wholly conducted is taxed by the State Board of Equalization for the year 1907 upon the buildings and all of said Bridge Company's property of every kind and character including everything which goes into the superstructure and forms a part of said bridge against the said St. Louis Bridge Company, and there is no authority in law to lay upon lessees or sub-lessees or licensees of bridges used for railroad purposes any taxes, but said bridge is taxable under the laws of the State of Missouri against the bridge owner only, and any tax against this defendant on any property forming part of said bridge or on any use made by defendant of said bridge is double taxation and is unauthorized and void.

15 (d) That said Terminal Railroad Association of St. Louis, assignee of said lease of said Eads Bridge and licensor of the defendant as aforesaid, during the years 1906 and 1907 was using said Eads Bridge and ran, or caused to be run, numerous freight and passenger trains over said Eads Bridge immediately under the upper or foot and wagon roadway of said bridge on which defendant was doing its business as licensee as aforesaid, and said Terminal Railroad Association was not and is not assessed or taxed for any part of said bridge or for any use of the same, neither is any other railroad company taxed for use of said bridge, and the assessment attempted in this case is an unjust discrimination against the defendant herein.

III.

That said attempted valuation, assessment and taxation of the defendant in this case, is in violation of Section 8 of Article I of the Constitution of the United States giving Congress sole power to regulate interstate commerce among the several states and is also in violation of Federal laws and of Section 1 of the Fourteenth amendment of said Federal Constitution, prohibiting the state from taking property without due process of law; that said attempted valuation, assessment and taxation of defendant is in violation of Sections 3 and 4 of Article X of the Constitution of the State of Missouri, requiring taxes to be uniform on same class of subjects, and to be in proportion to its value.

16 IV.

That on, to wit, the 18th day of May, 1908, the defendant made tender of $321.54 in lawful money of the United States to plaintiff. That said sum was all the taxes legally assessable, due or collectable at said time, together with all penalties, if any taxes at all were legally assessable, due or collectable, which defendant denies, and defendant has stood, and at all times since and still stands ready and willing to pay said sum.

Wherefore, defendant having fully answered, prays to be dismissed, hence with its costs.

DAWSON & GARVIN,
Attorneys for Defendant.

Reply.

The reply is a general denial.

On Thursday, January 14th, 1915, the following proceedings were had before Honorable W. M. Kinsey, Judge of Division No. 5 of this Court in the above-entitled case:

Agreed statement of facts filed. Reply filed.

On Saturday, September 4th, 1915: Stipulation for submission of cause filed.

Monday, September 13th, 1915: Submission upon agreed statement of facts.

Now at this day upon motion of the plaintiff by attorney, it is ordered by the Court that the order issued in this cause August 5th, 1915, continuing the cause upon application of plaintiff, be and is hereby set aside, vacated and for naught held.

Thereupon the parties submit this cause to the Court upon
17 the agreed statement of facts heretofore filed herein; and the Court being not sufficiently advised thereof takes time to consider hereof.

Judgment.

(Caption Omitted.)

Friday, December 22nd, 1916.

This cause having heretofore, to wit, on the 13th day of September, 1915, been submitted to the Court by the parties hereto upon the agreed statement of facts filed January 14th, 1915, the stipulation for submission of cause filed September 4th, 1915, and the arguments of counsel for the respective parties hereto, a jury having been waived and the Court being now at this day fully advised of and concerning the premises doth find the issues joined in favor of the plaintiff, and against the defendant and doth find that the defendant is indebted to the plaintiff for state, city, school, library and art museum taxes, for the year 1907, in the sum of amounting to $4,319.56, making in the aggregate the sum of $8,356.19, and an attorney fee of 5 per cent amounting to $201.83 to be taxed as costs.

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant the aggregate debt aforesaid, to wit, the sum of $8,356.19 together with the costs of this suit and that execution issue therefor. It is further considered and adjudged by the Court that the plaintiff be and is hereby allowed an attorney fee of $201.83 to be taxed as costs in this cause.

Declaration of law given, modified and refused, filed. Memorandum filed. (For Judge Kinsey's memorandum see pp. 78-85.)

Saturday, December 23rd, 1916: Defendant's motion to set aside findings and judgment and grant it a new trial filed.

18 Plaintiff's motion to modify judgment and increase allowance for attorneys' fee filed.

Motion to Modify and Motion for New Trial Overruled.

(Caption Omitted.)

Friday, December 29th, 1916.

The Court having duly considered the plaintiff's motion filed December 26th, 1916, to modify judgment by increasing the allowance for attorneys' fees heretofore filed and this day submitted herein doth order that the same be, and is hereby, overruled without prejudice to plaintiff.

The Court having also duly considered the defendant's motion filed December 23rd, 1916, and heretofore submitted herein, for a new trial, doth order that said motion be, and the same is hereby, overruled. Memorandum filed.

(Caption Omitted.)

Saturday, December 30th, 1916.

Now at this day, upon motion of the defendant, by its attorney, and for good cause shown, it is ordered by the Court that execution herein be stayed to and included February 1st, 1917, pending the filing of an affidavit for appeal.

Saturday, January 6th, 1917: Plaintiff's motion to retax costs and increase allowance for attorneys' fees filed.

19 *Defendant's Affidavit for Appeal.*

STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court, City of St. Louis, December Term, 1916.

THE STATE OF MISSOURI at the Relation and to the Use of JAMES HAGERMAN, Jr., Collector of the City of St. Louis, in the State of Missouri, Plaintiff,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RY. CO., a Corporation, Defendant.

STATE OF MISSOURI,
City of St. Louis, ss:

Wm. E. Garvin, attorney for St. Louis & East St. Louis Electric Railway Company, appellant, and authorized agent of said appellant to make this affidavit, being duly sworn, makes oath and says, that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

WM. E. GARVIN.

Subscribed and sworn to before me this 25th day of January, A. D. 1917.

[SEAL.]

NAT GOLDSTEIN,
Clerk.

20 *Appeal Allowed.*

The following proceedings were had before Honorable William T. Jones, Judge of Division No. 5 of this Court:

(Caption Omitted.)

Thursday, January 25th, 1917.

Now at this day, upon motion by attorney, and for good cause shown, the Court doth grant the defendant thirty days additional time within which to file its bill of exceptions herein; thereupon, defendant files and presents to the Court an affidavit for appeal and an appeal bond conditioned according to law, in the penal sum of $17,116.04, with the American Surety Company of New York, as surety, and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined said bond and affidavit for appeal doth approve said bond and order the same filed, which is accordingly done, and doth order that an appeal be and is hereby allowed the defendant to the Supreme Court of Missouri, from the judgment or decision of the Court heretofore rendered herein.

Plaintiff's Motion to Retax Costs Sustained.

(Caption Omitted.)

Thursday, February 1st, 1917.

The Court having duly considered the plaintiff's motion filed January 6th, 1917, and heretofore submitted, to retax costs and to increase the allowance for attorneys' fees, together with the proof adduced in support thereof, doth order and adjudge that said motion be, and is hereby sustained; that the order entered in this cause December 22nd, 1915, allowing the plaintiff an attorney fee
21 of 5 per cent, amounting to $201.83, be set aside and vacated, and that Messrs. Thomas L. Rutledge and J. M. Lashly, attorneys of record for the plaintiff be, and are hereby, allowed a reasonable attorneys' fee, to wit, the sum of $1,000.00, for bringing and conducting this suit, which shall be taxed against the defendant and paid as other costs in this case, with leave to plaintiff to petition the Court later for additional fees in the event that further services are rendered.

Defendant's Motion for New Trial of Motion to Retax, etc., Filed, Overruled and Appeal Allowed.

(Caption Omitted.)

Friday, February 2nd, 1917.

Now at this day comes the defendant, by its attorney, and files and submits to the Court its motion to set aside the order sustaining plaintiff's motion to retax costs and allowing plaintiff $1,000.00 as attorneys' fees and to grant it a new trial thereon; and the Court having duly considered said motion, doth order that the same be, and is hereby overruled; thereupon, said defendant files and presents to the Court an affidavit for appeal from the action and order of the Court sustaining plaintiff's motion to retax costs; and the Court having seen and examined said affidavit doth order that an appeal be, and is hereby allowed said defendant to the Supreme Court of Missouri, from the judgment and decision of the Court heretofore rendered herein.

Defendant's affidavit for appeal from order sustaining plaintiff's motion to retax costs and increase attorneys' fees:

22 *Affidavit for Appeal.*

STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court, City of St. Louis, December Term, 1916.

STATE OF MISSOURI ex Rel. JAMES HAGERMAN, Jr., Collector, etc.,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RY. CO.

STATE OF MISSOURI,
City of St. Louis, ss:

Wm. E. Garvin, attorney and authorized agent of defendant to make this affidavit for appeal from the action and order of the Court sustaining plaintiff's motion to retax costs being duly sworn, makes oath and says, that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

WM. E. GARVIN.

Subscribed and sworn to before me this 2nd day of February, A. D. 1917.

[SEAL.] NAT GOLDSTEIN,
Clerk.

(Caption Omitted.)

Wednesday, June 6th, 1917.

Now at this day comes the defendant, by its attorney and tenders to the Court its bill of exceptions, which is allowed, signed, sealed, ordered filed and made a part of the record in this cause which is accordingly done.

23 *Bill of Exceptions.*

(Omitting Caption.)

Be it remembered, that upon the trial of the above-entitled cause in the Circuit Court of the City of St. Louis in Division No. 5, before the Honorable Wm. M. Kinsey, Judge of said court, the following proceedings were had:

Appearances:

Thos. G. Rutledge, Esq., of Rutledge & Lashly, successors of Johnson, Houts, Marlatt & Hawes, attorneys for plaintiff.
Dawson & Garvin, attorneys for defendant.

By agreement between counsel on August 5, 1915, this case was submitted to the Court on the agreed statement of facts theretofore

filed herein on, to wit, January 14, 1915, oral arguments to be made and briefs submitted at a later date fixed by the Court on, to wit, November 27, 1915, which agreed statement of facts with objections of counsel for plaintiff and defendant to specific clauses thereof noted on the margin, is in words and figures following, to wit:

Agreed Statement of Facts.

(Caption Omitted.)

It is stipulated and agreed by and between the parties through their respective counsel of record in the above-entitled case, that the following agreed statement of facts and all inference of facts properly deducible therefrom, shall be taken as established facts for the purposes of a decision of this case, subject only to objections for
24 relevancy and materiality:

1. The St. Louis & East St. Louis Electric Railway Company was organized and incorporated in the year 1889 as a railroad company, with western terminus in Missouri and eastern terminus in Illinois, under the provisions of Article II of Chapter 21 of the Revised Statutes of Missouri of 1879.

2. It has been granted no special privilege or right of any kind or nature by and has no franchise from the City of St. Louis, Missouri.

Plaintiff objects; incompetent and immaterial.

3. That the St. Louis Bridge Company was previously organized under the Missouri and Illinois laws and had erected under an act of Congress of the United States a toll bridge known as the Eads Bridge, which extended over the Mississippi River, a navigable stream, from the City of St. Louis, Missouri, to the City of East St. Louis, Illinois, having two decks or roadways; the lower one for steam railroads and the upper deck a foot and wagon roadway.

4. Said Bridge Company had also previously leased said bridge to the Wabash, St. Louis & Pacific Railway Company and the Missouri Pacific Railway Company, corporations created and operating steam railroads under and by virtue of the laws of the states of Ohio, Indiana, Illinois and Missouri.

5. On July 26, 1889, defendant entered into a written contract with the said St Louis Bridge Company and said Missouri Pacific Railway Company and said Wabash, St. Louis & Pacific Railway Company (owner and lessees of said bridge as aforesaid), under and by virtue of which, the defendant in consideration of a certain division of the fare to be paid by bridge passengers for riding
25 across said bridge, was permitted to operate on the upper or foot and wagon roadway, electric trolley cars, subject to the conditions and regulations in said agreement contained. This contract was to continue for a period of fifteen years from date; to be renewable on conditions named therein for an additional period of fifteen years.

6. Pursuant to this contract, an electric trolley car railroad was constructed wholly upon said bridge. The power house and car sheds being built on the Illinois side and the cars kept on the Illinois side, except when in use running back and forth from one end of said bridge to the other.

The rails were furnished by the defendant of a pattern selected and approved by the Bridge Company. The Bridge Company at its own cost laid the railway tracks and maintains and keeps them in repair as part of the upper or wagon roadway of the bridge. The trolley poles and wire were erected and strung and are maintained at the cost of the defendant.

7. The defendant owned and operated two motor cars until the 15th day of November, 1902, after which time all the cars used in the operation of said electric railway were rented by the defendant, together with the electric power. The said Eads Bridge and approaches are something over a mile in length. The actual measured length of the trolley car tracks on said bridge west of the boundary line between said states of Illinois and Missouri was and is .346 miles and has been variously estimated by the State Board of Equalization at .50 miles, at .40 miles, at .346 miles. The total actual length including that east of said State boundary line was and is .865 miles. All of it is on the bridge structure.

26 8. That in April, 1902, defendant's said contract of July 26th, 1889, was canceled and there was substituted another agreement with the Terminal Railroad Association of St. Louis, which association had previously acquired by assignment the lease of said Eads Bridge to the Wabash Railroad Company and the Missouri Pacific Railway Company, mentioned in paragraph 4 hereof. Said substitute agreement is of date April 11, 1902, and permits defendant to operate electric cars on the upper roadway of said bridge for fifty years unless sooner terminated by said Terminal Company. The East St. Louis Electric Street Railroad Company and the East St. Louis & Suburban Railway Company, both Illinois corporations, are also made parties. The express purpose is procuring said street car passenger traffic to cross said river over said Eads Bridge. Under said agreement the said Terminal Association retains ownership and control of the tracks over which said trolley cars are to be run for passenger traffic only; said passengers are to be carried for a certain division of the fare of not less than five, nor more than ten cents per passenger as determined by said Terminal Company to be paid by said bridge passengers for riding across said Eads Bridge; said electric cars to be run between the termini of said bridge; and for refusal, inability or failure of the other parties to direct travel destined to pass by way of East St. Louis to or from said City of St. Louis exclusively to said Eads Bridge, or to keep the other conditions of said agreement, said Terminal Company reserves the right to declare said agreement terminated and canceled. A copy of this contract is attached as an appendix.

27 9. These trolley cars carried passengers from one end to the other end of said bridge.

10. That defendant never did any business except such as was and is permitted by said contract with said bridge owner and lessees and assignee and defendant's sole business was and is conducted on said Eads Bridge and was and is the carrying of bridge passengers only and this business was and is confined to carrying such passengers from the State of Illinois to the State of Missouri, and vice versa, and the defendant did not and does not receive passengers at any point on said bridge in the State of Missouri to discharge them at any other point thereon also in said State of Missouri.

Plaintiff objects; incompetent, irrelevant and immaterial; relates to facts too long prior to 1907.

11. That on July 1st, 1881, all of the properties of the St. Louis Bridge Company were leased to the Missouri Pacific Railroad Company and the Wabash, St. Louis & Pacific Railway Company, and on October 3rd, 1889, said lease was assigned to the Terminal Railroad Association of St. Louis; but all of the properties of said Bridge Company have at all times been assessed and taxed against said St. Louis Bridge Company upon the assessments and valuations hereinafter set forth, and all said taxes have been paid.

Journal of State Board of Equalization 1881 (page 37): "On motion the board proceeded to assess, adjust and equalize the property, real and personal, belonging to the following bridge companies in the State on the first day of August, 1880, and to assign the values thereof to counties and municipal divisions as provided by
28 law and the board having duly considered all the evidence adduced in regard to such property as well as the like property of other bridges in this State and also the reports of said companies and of the counties reporting thereon, doth on motion adopt the following schedules and tables as being a just, proper and legal assessment, adjustment and equalization of the property of said companies at the day and year last aforesaid."

(Page 140): "Aggregate valuation of that portion of the St. Louis Bridge Company (formerly the Illinois and St. Louis Bridge Company) in the State of Missouri, on the first day of August, 1880, as assessed, adjusted and equalized by the State Board of Equalization for the taxes of 1880 under an act of the General Assembly of the State of Missouri, entitled an act to provide for the assessment and collection of taxes on bridges owned by joint stock companies and property and franchises owned by telegraph and express companies approved April 21, 1899: St. Louis Bridge Co., County of St. Louis, total value in county, $800,000.00."

Journal of State Board of Equalization 1882 (page 9): "The board then proceeded to assess, adjust and equalize the property belonging to the following bridge companies, and fixed the values thereof as follows: Portion of St. Louis Bridge, $1,000,000.00."

(Page 149): "Aggregate valuation of the property in the State of Missouri owned by the following bridge companies on the first day of August, 1881, as assessed and equalized by the State Board of Equali-

zation for the taxes of 1882: Portion of St. Louis Bridge Company in Missouri, St. Louis City, $1,000,000.00."

Journal of State Board of Equalization, 1889 (page 28): "On motion the board proceeded to assess, adjust and equalize the property belonging to the following bridge companies and railroad companies on the first day of June, 1889, for the taxes of 1890, and having duly considered all the evidence in regard to the same, fixed the values as follows: Portion of the bridge of the St. Louis Bridge Company at St. Louis, $1,150,000.00."

(Page 272): "Aggregate and detailed description and valuation of property in the State of Missouri owned by the following Bridge Companies, etc., on the first day of June, 1889, as assessed, adjusted and equalized by the State Board of Equalization in 1890:

Name of company—St. Louis Bridge Company.
Name of bridge—St. Louis Bridge, portion in Missouri.
County—St. Louis City.

Valuation in county	$1,150,000.00
Total valuation in county	1,150,000.00
Total valuation in State of Missouri	1,150,000.00

Journal of State Board of Equalization, 1891 (page 28): "On motion the board proceeded to assess, adjust and equalize the valuation of bridges belonging to the following bridge companies, railroad companies and individuals on the first day of June, 1890, for the taxes of 1891, and having fully considered all the evidence in regard to the same, fixed the values as follows: Portion of bridge of the St. Louis Bridge Company at St. Louis, $1,150,000.00."

(Page 248): "Aggregate and detailed description and valuation of property in the State of Missouri owned by the following
30 bridge companies, individuals and railroad companies on the first day of June, 1890, as adjusted and equalized by the State Board of Equalization in 1891:

Name of company—St. Louis Bridge Company.
Name of bridge—St. Louis Bridge, portion in Missouri.
County—St. Louis City.

Valuation in county	$1,150,000.00
Total valuation in county	1,150,000.00
Total valuation in State of Missouri	1,150,000.00

Plaintiff objects; incompetent, irrelevant and immaterial.

12. That no part of the length of the said bridge structure has ever been included by the State Board of Equalization in the miles of tracks in the State of Missouri of the said Missouri Pacific Railroad Company or of the said Wabash, St. Louis & Pacific Railway Company, or of the Terminal Railroad Association assessed or taxed by said board against said railroad companies, respectively, and said railroad companies have at all times here involved been assessed and taxed solely upon the mileage basis and only on the number of miles of their respective roadbeds and superstructure located in the State of Missouri.

13. That said railroad companies have at all times here involved been running freight and passenger trains on, to, over and off of the lower deck or roadway of said Eads Bridge, immediately under the said upper or foot and wagon roadway of said bridge.

14. That defendant on June 1st, 1896, owned property in the State of Missouri consisting of certain poles and overhead trolley wires erected and maintained on the west end of said Eads Bridge as a necessary working part and continuation of other poles
31 and overhead trolley wires erected and maintained on the east or Illinois end of said bridge, all under said agreement of July 26th, 1889, and said substitute agreement and also $26,524.55 on deposit on June 1st, 1896, in — Bank of the City of St. Louis, Missouri, which was proceeds of said business done on said bridge under said agreements, and also two cars valued at $8,750.00 each.

15. That on June 1st, 1896, defendant had and used in the State of Missouri as aforesaid, the identical same property that is so had and used on June 1st, 1897, and on June 1st, 1898 (except the amount of money on deposit, which was as follows: On June 1st, 1898, $1,812.30; on June 1, 1899, $3,812.68; and on June 1, 1900, $26,524.55), and the said State Board valued all of defendant's property in Missouri at a total valuation for taxation for the year 1898 of $8,500.00; for the year 1899, $147,881.14, and for the same year 1900, as reassessed by said State Board in 1907, of $147,881.00; and in 1907, for the year 1907, of $186,019.98; and said State Board alleged that the length of defendant's road in Missouri was .70 miles on June 1st, 1897, .40 miles on June 1st, 1898; .40 miles on June 1st, 1899, and .346 miles on June 1st, 1900.

16. That on May 18th, 1908, the defendant made tender to the Collector of the Revenue of the City of St. Louis, Missouri, at his office in said City of St. Louis, the sum of $321.54 in lawful money of the United States and defendant has at all times since kept said tender good and still stands ready and willing to pay said sum.

Defendant objects to whole of 17 as immaterial and irrelevant.

32 17. The entire portions relating to defendant company in the certified and printed record of the proceedings for the year 1907, of the State Board of Equalization for the assessment and equalization of railroad, bridge, telegraph and telephone property (called Journal of the State Board of Equalization for the year 1907), page 45, reads as follows:

"Mr. Wilder moved that, as the courts have held that the assessment of the St. Louis & East St. Louis Electric Railway for the taxes of the years 1899 and 1900 was irregular or void, that the board proceed, under Section No. 9376, R. S. 1899, to reassess the said property for the years of the above named years, as follows:

For taxes of the year 1899—Rolling stock and money, proportion to this State	$1,827.73
.40 miles roadbed and superstructure at $365,133.53 per mile	146,053.41
Total	$147,881.14
For taxes of the year 1900—Money, proportion to this State	$1,694.53
.40 miles roadbed and superstructure at $365,466.53 per mile	146,186.61
Total	$147,881.14

Plaintiff objects; immaterial and irrelevant.

On motion the board proceeded to assess, adjust and equalize the value of the rolling stock, roadbed and superstructure, and 'all other property' mentioned in Laws of 1901, Section 2, page 232, per mile, and the aggregate value of buildings of the following railroad and railway companies, on the first day of June, 1906, for the
33 taxes of 1907, and having heard all the evidence in relation to the same, by unanimous vote, fixes the distributable value, per mile, of the rolling stock, roadbed and superstructure, and "all other property,' and the aggregate value of buildings of said railroads and railways, as follows:"

And among the "Electric and Street Railways" the following appears:

34 Name of line.	Mileage.	Value per mile of rolling stock.	Value per mile of roadbed and superstructure.	Value per mile of "all other property."	Total distributable value per mile.
St. Louis & East St. Louis Electric Railway....	.346	32,629.5375	5,000.0000	500,000.4625	537,630.00

35 And page 51 reads as follows:

"The Secretary laid before the board the tables of the valuation of all railroad, bridge, telegraph and telephone property, as apportioned to the counties and municipal divisions thereof, and the City of St. Louis, which were examined and found correctly extended, in conformity with the orders of the board; whereupon they were approved and adopted as the assessment of railroad, bridge, telegraph and telephone property, for the taxes of the year 1907, as set out in the following tables and are ordered spread upon the record of the proceedings of the board, and made a part thereof."

Among said tables the following appears on pages 288, 290:

"St. Louis & East St. Louis Electric Railway.

Aggregate and detail description and valuation of property in the State of Missouri, owned by the St. Louis & East St. Louis Electric Railway Company on the first day of June, 1906, as assessed, adjusted and equalized by the State Board of Equalization in 1907."

Defendant objects: immaterial and irrelevant.

Aggregate and Detail Description and Valuation of Property in the State of Missouri, Owned by the St. Louis & East St. Louis Electric Railway Company on the First Day of June, 1906, as Assessed, Adjusted and Equalized by the State Board of Equalization in 1907.

Roadbed, Superstructure, Rolling Stock and 'All Other Property.'

County.	Township, City, and Town.	No. of miles.	Valuation per mile.	Valuation in sub-division.	Valuation in county.	Buildings. Valuation in sub-division.	Buildings. Valuation in county.	Totals. Value in sub-divi'n.	Totals. Value in county.
St. Louis City		.346	$537,630	.....	$186,019.98	.....	.....	.....	$186,019.98
Totals					$186,019.98	.....	.....	.....	$186,019.98

Itemized Statement.

Length of road in State of Missouri	.346
Length of road in other States	.519
Total	.865

"St. Louis & East St. Louis Electric Railway.—*Continued.*

Rolling Stock and Miscellaneous Property.

2 Passenger cars at $850	$1,700.00	
Money on hand or in bank	26,524.55	
Total rolling stock, etc., used over .865 miles	$28,224.55	
.519 miles rolling stock to other States at $32,629.5375 per mile	16,934.73	
Proportion of rolling stock to this State	$11,289.82	
.346 mile roadbed and superstructure at $5,000 per mile	1,730.00	
'All other property' at $500,000.4625 per mile	173,000.16	
Total		$186,019.98"

Defendant objects; immaterial and irrelevant.

"St. Louis & East St. Louis Electric Railway.

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Aggregate and Detail Description and Valuation of Property in the State of Missouri, Owned by the St. Louis & East St. Louis Electric Railway Company on the First Day of June, 1899, *as Assessed, Adjusted and Equalized by the State Board of Equalization in* 1907.

For the Taxes of the Year 1900.

Roadbed, Superstructure, Rolling Stock and 'All Other Property.'

County.	Township, City, and Town.	No. of miles.	Valuation per mile.	Valuation in subdivision.	Valuation in county.	Buildings. Valuation in subdivision.	Buildings. Valuation in county.	Totals. Value in subdiv'n.	Totals. Value in county.
St. Louis City.....		.40	$369,702.84	.....	$147,881.14	.....	.....	.....	$147,881.14
Totals					$147,881.14	.....	.....	.....	$147,881.14

"St. Louis & East St. Louis Electric Railway.—*Continued.*

Itemized Statement.

Length of road in State of Missouri		.40
Length of road in other States		.50
Total		.90

Rolling Stock and Miscellaneous Property.

Money on hand or in bank	$3,812.68	
Total amount to .90 mile	$3,812.68	
.50 mile to other States at $4,236.31 per mile	2,118.15	
Proportion to this state	$1,694.53	
.40 mile roadbed and superstructure at $365,466.53 per mile	146,186.61	
Total		$147,881.14"

Plaintiff objects; incompetent, irrelevant and immaterial.

37 Plaintiff objects to all matter on this page; irrelevant ated immaterial.

"Bridges (for Year 1907).

Name of Company—St. Louis Bridge.	
Name of Bridge—St. Louis Bridge, portion in Mo.	
City and Town—St. Louis.	
Valuation of physical property in County	$1,200,000.00
Valuation of 'all other property' in County	700,000.00
Total value in the County	$1,900,000.00
Total value in the State	1,900,000.00"

"Bridges (for Year 1902).

Name of Company—St. Louis Bridge Company.	
Name of Bridge—St. Louis Bridge, portion in Mo.	
County—St. Louis City.	
Valuation of physical property in County	$1,200,000.00
Valuation of 'all other property' in County	500,000.00
Total valuation in the State	$1,700,000.00"

Plaintiff objects to all matters relating to assessment in 1900 and 1899.

18. The certificates of the State Auditor (Wm. W. Wilder), each of date August 6th, 1907, certify to the Registrar of the City of St. Louis in the certificate of "Reassessment of property owned June 1st, 1899, for the taxes of the year 1900" "that the entire length of the St. Louis & East St. Louis Electric Railway, including sidetracks in the State of Missouri, is .40 miles"; and in the certificate of
38 assessment for the year 1907 "that the entire length of the St. Louis & East St. Louis Electric Railway in the State of Missouri is .346 miles"; in said certificate of reassessment "that the valuation thereof per mile is 369,702.84 dollars," and that the total value of money is 3,812.68 dollars; and that the value of that portion of money assessed by the State Board for the assessment and equalization of railroad property for the year 1907 for the taxes of the year 1900 in the State of Missouri is 1,694.53 dollars; that the value of said money as apportioned to this line in said State is the sum of 1,694.53 dollars; that the total length of the roadbed, including sidetracks of said railway in St. Louis City and in each city, town, village and municipal township thereof and "the total value of the roadbed and superstructure, sidetracks, money, buildings on right-of-way as adjusted, equalized, assessed and apportioned to said county and each city, town, village and municipal township therein by the said State Board for the assessment and equalization of railroad property for the year 1907 for the taxes of the year 1900 is correctly set forth in the following table:

39 County of—	Roadbed including sidetracks, number of miles.	Value per mile of roadbed and superstructure including sidetracks.	Value per mile of property named in section 9339 except buildings.	Total value of roadbed and superstructure, sidetracks, rolling stock, 'all other property' and buildings on right-of-way.
St. Louis City.....	.40	$365,466.53	$4,256.31	$147,881.14"

40 Plaintiff objects to all matters relating to assessment in 1899 and 1900.

And in said certificate of assessment for the year 1907," that the valuation thereof per mile is 537,630.00 dollars, and that the total value of the rolling stock is 28,224.55 dollars, "and that the value of that portion of the rolling stock assessed by the State Board for the assessment and equalization of railroad property for the year 1907 in the State of Missouri is 11,289.82 dollars; that the value of said rolling stock, as apportioned to this line in said State, is the sum of 11,289.82 dollars, and that the value of 'all other property' mentioned in laws of 1901, section 2, page 232, as fixed by said Board upon this line in said State of Missouri is the sum of 173,000.16 dollars; that "the total length of the roadbed, including sidetracks of said railway, in St. Louis City and in each city, town, village, and municipal township thereof, and the total value of the roadbed and superstructure, sidetracks, rolling stock, buildings on the right-of-way, and 'all other property' as adjusted, equalized, assessed and apportioned to said county and each city, town, village and municipal township therein, by the said State Board for the assessment and equalization of railroad property for the year 1907, is correctly set forth in the following table:

41 County of—	Roadbed including sidetracks: number of miles.	Value per mile of roadbed and superstructure, including sidetracks.	Value per mile of rolling stock and other property named in section 9239, except buildings.	Value per mile of "all other property," laws 1901, sec. 2, p. 222.	Total value of roadbed and superstructure, sidetracks, rolling stock, "all other property," and buildings on right of way.
St. Louis City	.346	$5,000.00	$32,629.3375	$500,000.1625	$1,865,019.50

42 19. The receipts of the Comptroller of the City of St. Louis for the tax bills sued on for the years 1900 and 1907 show that they were made out by the Registrar on the basis respectively of the Auditor's said certificates.

Plaintiff objects to all matters relating to 1899 and 1900.

20. The entries of date Aug. 17, 1907, for the years 1907 and 1900 in the railroad tax book for the City of St. Louis shows the extension of taxes assessed against the defendant for the years 1907 and 1900 as follows:

	Valuation.		Rate.		Taxes.	
	For 1906.	For 1907.	For 1906.	For 1907.	For 1906.	For 1907.
State Revenue	$147,881.14	$186,019.98	.15	.15	221.82	279.03
State Interest	147,881.14	186,019.98	.10	.02	147.88	37.20
School Tax	147,881.14	186,019.98	.40	.55	591.52	1023.11
City Tax Old Limits	147,881.14	186,019.98	1.28	1.39	1892.88	2585.68
Public Free Library	147,881.14	186,019.98	.02	.04	29.58	74.41
Art Museum	.....	186,019.98	....	.02	.....	37.20
Total Tax	$147,881.14	$186,019.98	1.95	2.17	2883.68	4036.63

44 Defendant objects as irrelevant, immaterial and incompetent.

21. The tax bill sued on in this case (No. 8027) is the original tax bill issued, a copy of which is as follows:

"Railroad, Bridge and Telegraph Company Tax Bill.

St. Louis and East St. Louis Electric Railway to the City of St. Louis.

For Railroad, Bridge and Telegraph Company Taxes, for the year 1907, on property in the City of St. Louis, as assessed by the State Board of Equalization of the State of Missouri.

	Valuation.	Rates.	Taxes.
State Revenue	186,019.98	.15	279.03
State Interest	186,019.98	.02	37.20
School Tax	186,019.98	.55	1023.11
City Tax, New Limits			
City Tax, Old Limits	186,019.98	1.39	2585.68
Public Free Library	186,019.98	.04	74.41
Art Museum	186,019.98	.02	37.20
Total Tax	186,019.98	2.17	4036.63

Received from the —— the sum of $—— being the amount of Railroad, Bridge and Telegraph Co. Taxes for the year 19—, as assessed by the State Board of Equalization of the State of Missouri.

(Signed) JAMES Y. PLAYER,
Comptroller.
PATRICK H. KEGAN,
Register.
——,
Collector.

45 22. The City of St. Louis by ordinance No. 23043 fixed the rate and per centum of taxes to be levied and collected for the year 1907 for municipal purposes $1.10 on each one hundred dollars of assessed valuation, for payment of interest fifteen-hundredths of one per centum; for World's Fair interest and sinking fund, seven-hundredths of one per centum; for payment interest and sinking fund for public improvement loans, seven-hundredths of one per centum; making a total of $1.39; and, in addition, for library fund, two-fifths of one mill per dollar; for Art Museum, one-fifth of one mill per dollar.

23. That the Board of Education of the City of St. Louis, by resolution duly adopted and certified to the City Comptroller, the City Register and the City Collector, determined the rate of taxation for the year 1907 for school purposes at fifty-five hundredths of one

per cent, being fifty-five cents on each one hundred dollars of assessed valuation.

24. That the rate of levy for state purposes was fixed by Act of Legislature for the year 1907 (Laws 1903, p. 257) at fifteen cents on each hundred dollars valuation, and, in addition, at two cents on each hundred dollars valuation to pay certain interest.

Defendant objects, as incompetent and irrelevant.

25. The Gross receipts of the defendant from all sources for the year 1907 were $165,959.47 and the operating expenses for that year were $99,575.68 and for the year 1906 $142,279.30 and $85,367.58, respectively, and for the year 1905 $127,807.18 and $76,684.31, respectively, and for the year 1904 $142,183.72 and $110,192.38, respectively, and for the year 1903 $116,348.02 and $69,-
46 808.81, respectively, and from April 1st, 1902, to December 31st, 1902, $72,674.11 and $24,224.70, respectively.

Defendant objects; irrelevant and immaterial.

26. Said company was incorporated for the sum of $100,000.00 and its capital stock increased in 1890 to $250,000.00 and increased in 1902 to $500,000.00; it had a bonded indebtedness of $75,000.00 on which it paid 6 per cent interest until 1902, when the bonded indebtedness was increased to $500,000.00, on which it paid 5 per cent interest. From 1902 to 1907, inclusive, the dividends aggregated 17 per cent.

Defendant objects; irrelevant and immaterial.

27. To increase bridge traffic and for reasons of convenience and economy, the defendant late in 1902 made a from-year-to-year contract with the said East St. Louis & Suburban Railway Company by which the said East St. Louis & Suburban Railway Company furnished defendant with power, car, crews and equipment and all other operating expenses, barring taxes, for 60 per cent of the gross receipts, except for the year 1904, when 77½ per cent of the gross receipts were thus paid. The cars thus furnished by said East St. Louis & Suburban Railway Company with the same motormen and conductors continued on into East St. Louis and some of them through East St. Louis into adjacent Illinois territory. The fare charged across the bridge only was ten cents for a single ride, either way, and thirty cents for a four-ride unlimited bridge ticket; and limited commutation bridge tickets were sold at various prices, as low as $2.00 for individual fifty-two ride bridge tickets. Persons desiring to ride either way across the bridge and also into
47 Illinois beyond the east end of the bridge were sold coupon tickets at varying prices, depending on route and distance traveled in Illinois. The fare collected for the different companies was kept distinct by these coupon tickets, five cents of the price going to the defendant, of which one-half was paid over to the Terminal Railroad Association. For several years prior to 1906 the capital stock and bonds of the defendant were entirely owned by the

East St. Louis & Suburban Company, a corporation organized under the laws of New Jersey, which company also owned the capital stock and bonds of said East St. Louis & Suburban Railway Company and of other companies, including electric light and power companies. All of the capital stock and bonds of the defendant company, together with stocks and bonds of said other companies, were and are pledged as security for the collateral trust bonds issued by the said St. Louis & Suburban Company.

Defendant objects; irrelevant and immaterial.

28. The State Board of Equalization held stated meetings for consideration of the valuation and assessment of railroad, bridge, telegraph and telephone property for the taxes of 1907, of which due notice was given to the officers of such companies, including defendant. The defendant, through its president, Mr. L. C. Haynes, appeared before the board at one of said meetings, to wit, on June 7th, 1907, and was heard in relation to the valuation and assessment of the property of the defendant company for the taxes of 1907.

JOHNSON, RUTLEDGE & LASHLY,
Attorneys for Plaintiff.
DAWSON & GARVIN,
Attorneys for Defendant.

48 This was all the evidence offered in the case.

Thereafter, to wit, November 27th, 1915, this cause theretofore submitted on said agreed statement of facts as aforesaid, was duly argued on behalf of both parties by respective counsel, and taken under advisement by the Court.

Whereupon and at said time, defendant prayed the Court to declare the law to be as follows:

Declarations of Law as Asked by Defendant.

1.

(Caption Omitted.)

The Court declares the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover in the above-entitled case and the finding and judgment of the Court must be for the defendant.

2.

(Caption Omitted.)

The Court declares the law to be that the burden of proof rests upon plaintiff in the above-entitled case to prove by a preponderance of evidence that at the several times stated in said petition the defendant owned roadbed, tracks and rolling stock in the quantities

specified in said several petitions, and operated a railroad in the City of St. Louis and State of Missouri as a railroad company; and failing to so prove these facts, plaintiff cannot recover taxes assessed or levied upon said alleged property.

49 3.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that in the amount sued for in this case any illegal tax is inseparably included, then plaintiff is not entitled to recover any amount in this case.

4.

(Caption Omitted.)

The Court declares the law to be that any levy of a tax to be legal, must be based upon a legal assessment, and there can be no lawful collection of a tax until there is an authorized assessment of property owned by the defendant, which is made taxable by law, and said assessment is made in compliance with all of the requirements of the statutes.

5.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that tenders were made in this case, then no costs or penalties accrued after the date of said tender can in any event be recovered, unless the amount due is greater than the amount tendered.

6.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that the tax bill sued on in this case is not authenticated by the certificate of the Collector or filed with the petition, then
50 such tax bill cannot be regarded as any evidence; or, if it appears that all or any of them are not based on a legal assessment, then they cannot be considered any evidence.

7

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that the defendant's business was at all said times confined to a toll across the Mississippi River extending from East St. Louis,

Illinois, to St. Louis, Missouri, and that the defendant did not do any carrying business local to Missouri, that is, which was begun in Missouri and ended in the State of Missouri, then the State Board is without authority to assess defendant by the "unit rule" or on the "mileage basis" and such assessment or re-assessment is illegal and void.

8.

(Caption Omitted.)

The Court declares the law to be that the facts respecting defendant's capital stock, interest paid on bonded indebtedness, gross and net earnings and dividends, should be disregarded as irrelevant and immaterial to any of the issues in this case.

9.

(Caption Omitted.)

The Court declares that the statute requires the State Board of Equalization to keep a full and fair record of its proceedings
51 and decisions to the end that parties assessed may know just what property was assessed and how it was assessed; and if it appears from the evidence in these cases that greatly different values were placed upon property described in the same identical manner; and if it further appears from the evidence that the defendant had and used at all the times in controversy substantially the same property (with exception of money on deposit in bank); and if it further appears from the evidence that no reasonable explanation for said discrepancies in valuation is to be found expressly or by reasonable implication from the record made by said State Board of its proceedings and decisions, and that said record is not a true record of their proceedings and decisions, then the plaintiff cannot recover and the judgment should be for the defendant.

10.

(Caption Omitted.)

The Court declares that double taxation is prohibited by the Constitution and laws of Missouri, and if it appears from the evidence that the St. Louis Bridge Company was assessed and paid taxes on any tangible or intangible property, any part of which was again assessed against this defendant, then said assessment against defendant as to said part so doubly assessed is illegal and void, and the plaintiff cannot recover of defendant any tax based thereon; and if it further appears from the evidence that there is such illegal taxes included in the amount sued for, and that it is so intermingled that it cannot be with certainty separated therefrom, then the plaintiff is not entitled to recover against the defendant in any amount.

52 11.

(Caption Omitted.)

The Court declares that the Constitution of Missouri requires all taxes to be uniform on the same class of subjects and must be distributed among those who are to pay it by a just ratio; and if it appears from the evidence that the Wabash, St. Louis & Pacific Railway Company and the Missouri Pacific Railway Company and the Terminal Railroad Association of St. Louis or any of them are taxed by the State Board of Equalization as railroads by the "unit rule" or "mileage basis," that they or any of them at the times here involved were lessees of the St. Louis Bridge Company and in the exclusive possession of the lower deck of said bridge, and were running freight and passenger trains over the lower deck of said Eads Bridge and that no part of the length of said bridge so leased, occupied or used by them, or any of them, has ever been included by the State Board of Equalization in the miles of tracks in the State of Missouri of the said railroads or any of them, assessed or taxed by said State Board against said railroads, or any of them, but that only the number of miles of their respective roadbeds and superstructure located in the State of Missouri, exclusive of the tracks on said bridge, and exclusive of their leasehold interest in said bridge, have been taxed; then any assessment or tax against the defendant in this case by the "unit rule" or "mileage basis" for any part of the length of said bridge, or on account of any license or contract interest in said bridge, is unjust discrimination against this defendant and such assessment and taxes are void.

53 12.

(Caption Omitted.)

The Court declares that any assessment or taxation by the State of Missouri, which imposes a direct burden upon interstate commerce, is in violation of the Federal Constitution and laws regulating interstate commerce among the several states and void and uncollectible and if it appears from the evidence that the defendant is solely engaged in interstate commerce and that its property of every kind or nature is used only as a necessary means of said interstate business, then the judgment in this case shall be in favor of the defendant.

13.

(Caption Omitted.)

The Court declares the law to be that the actual situs of personal property and not the domicile of the owner determines under the law of what State, if any, it shall be taxed, and if it appears from the evidence that at the times in controversy the power house and car sheds of the defendant were built in the State of Illinois and the trolley

cars were kept on the Illinois side of the river except when in transit running back and forth from one end of said bridge to the other, then defendant's said trolley cars can only be taxed by the State of Illinois, if taxable by any State, and in no event can they be taxed by the State of Missouri, and their assessment and taxation in this case is void and plaintiff cannot recover that part of the taxes sued for in this case.

54 14.

(Caption Omitted.)

The Court declares that the statutes of Missouri respecting taxation do not in terms apply to interstate commerce and it is not to be implied that the Legislature of Missouri intended to transcend its constitutional powers of taxation; or to tax interstate commerce directly or indirectly or lay any burden upon it; but such statutes should be construed as applying only to the intrastate or local or domestic part of the business or property of corporations or persons engaged in interstate as well as intrastate commerce, and if it appears from the evidence that the defendant does no intrastate business, that is, business which is both begun and ended within the territorial limits of the State of Missouri, but that all of its business consists of carrying passengers in trolley cars on said Eads Bridge from the State of Illinois into the State of Missouri, or from the State of Missouri into the State of Illinois, and all of its property is used as a necessary means of carrying on such business, then defendant is engaged in interstate commerce only, and its property, including that which lies on said bridge within the territorial limits of Missouri is used in interstate commerce only, and any assessment or tax against defendant by the State of Missouri would be void and the judgment in this case should be for the defendant.

The following of which declarations of law the Court refused to give; to which refusal to declare the law as prayed, the defendant, by its counsel, then and there excepted at the time.

55 *Refused Declarations of Law.*

1.

(Caption Omitted.)

The Court declares the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover in the above-entitled cause and the finding and judgment of the Court must be for the defendant.

2.

(Caption Omitted.)

The Court declares the law to be that the burden of proof rests upon plaintiff in the above-entitled case to prove by a preponderance of evidence that at the several times stated in said petition the defendant owned roadbed, tracks and rolling stock in the quantities specified in said petition, and operated a railroad in the City of St. Louis and State of Missouri, as a railroad company; and failing to so prove these facts, plaintiff cannot recover taxes assessed or levied upon said alleged property.

3.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that in the amounts sued for in this case any illegal tax is inseparably included, then plaintiff is not entitled to recover any amount in this case.

56

6.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that the tax bill sued on in this case is not authenticated by the certificate of the Collector or filed with the petition, then such tax bill cannot be regarded as any evidence; or, if it appears that all or any of them are not based on a legal assessment, then they cannot be considered any evidence.

7.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that the defendant's business was at all times confined to a toll across the Mississippi River extending from East St. Louis, Illinois, to St. Louis, Missouri, and that the defendant did not do any carrying business local to Missouri, that is, which was begun in Missouri and ended in the State of Missouri, then the State Board is without authority to assess defendant by the "unit rule" or on the "mileage basis" and such assessment or re-assessment is illegal and void.

8.

(Caption Omitted.)

The Court declares the law to be that the facts respecting defendant's capital stock, interest paid on bonded indebtedness, gross and

net earnings and dividends, should be disregarded as irrelevant and immaterial to any of the issues in this case.

57

9.

(Caption Omitted.)

The Court declares that the statute requires the State Board of Equalization to keep a full and fair record of its proceedings and decisions to the end that parties assessed may know just what property was assessed and how it was assessed; and if it appears from the evidence in the case that greatly different values were placed upon property described in the same identical manner; and if it further appears from the evidence that the defendant had and used at all the times in controversy substantially the same property (with exception of money on deposit in bank); and if it further appears from the evidence that no reasonable explanation for said discrepancies in valuation is to be found expressly or by reasonable implication from the record made by said State Board of its proceedings and decisions, and that said record is not a true record of their proceedings and decisions, then the plaintiff cannot recover and the judgment should be for the defendant.

10.

(Caption Omitted.)

The Court declares that double taxation is prohibited by the Constitution and laws of Missouri, and if it appears from the evidence that the St. Louis Bridge Company was assessed and paid taxes on any tangible or intangible property, any part of which was again assessed against this defendant, then said assessment against defendant as to said part so doubly assessed is illegal and void, and

58 the plaintiff cannot recover of defendant any tax based thereon, and if it further appears from the evidence that there is such illegal taxes included in the amount sued for, and that it is so intermingled that it cannot be with certainty separated therefrom, then the plaintiff is not entitled to recover against the defendant in any amount.

11.

(Caption Omitted.)

The Court declares that the Constitution of Missouri requires all taxes to be uniform on the same class of subjects and must be distributed among those who are to pay it by a just ratio; and if it appears from the evidence that the Wabash, St. Louis & Pacific Railway Company and the Missouri Pacific Railway Company and the Terminal Railroad Association of St. Louis or any of them are taxed by the State Board of Equalization as railroads by the "unit rule" or "mileage basis," that they or any of them

at the times here involved were lessees of the St. Louis Bridge Company and in the exclusive possession of the lower deck of said bridge, and were running freight and passenger trains over the lower deck of said Eads Bridge and that no part of the length of said bridge so leased, occupied or used by them, or any of them, has ever been included by the Board of Equalization in the miles of tracks in the State of Missouri of the said railroads or any of them, assessed or taxed by said State Board against said railroads, or any of them, but that only the number of miles of their respective roadbeds and superstructures located in the State of Missouri, exclusive of the
59 tracks on said bridge, and exclusive of their leasehold interest in said bridge, have been taxed, then any assessment or tax against the defendant in this case by the "unit rule" or "mileage basis" for any part of the length of said bridge, or on account of any license or contract interest in said bridge, is unjust discrimination against this defendant and such assessment and taxes are void.

12.

(Caption Omitted.)

The Court declares that any assessment or taxation by the State of Missouri, which imposes a direct burden upon interstate commerce, is in violation of the Federal Constitution and laws regulating interstate commerce among the several states and void and uncollectible; and if it appears from the evidence that the defendant is solely engaged in interstate commerce and that its property of every kind or nature is used only as a necessary means of said interstate business, then the judgment in this case shall be in favor of the defendant.

13.

(Caption Omitted.)

The Court declares the law to be that the actual situs of personal property and not the domicile of the owner determines under the law of what State, if any, it shall be taxed, and if it appears from the evidence that at the times in controversy the power house and car sheds of the defendant were built in the State of Illinois and the trolley cars were kept on the Illinois side of the river except when
60 in transit running back and forth from one end of said bridge to the other, then defendant's said trolley cars can only be taxed by the State of Illinois, if taxable by any State, and in no event can they be taxed by the State of Missouri, and their assessment and taxation in the case is void and plaintiff cannot recover that part of the taxes sued for in the case.

14.

(Caption Omitted.)

The Court declares that the statutes of Missouri respecting taxation do not in terms apply to interstate commerce and it is not to be implied that the Legislature of Missouri intended to transcend its constitutional powers of taxation; or to tax interstate commerce directly or indirectly or lay any burden upon it; but such statutes should be construed as applying only to the intrastate or local or domestic part of the business or property of corporations or persons engaged in interstate as well as intrastate commerce; and if it appears from the evidence that the defendant does no intrastate business, that is, business which is both begun and ended within the territorial limits of the State of Missouri, but that all of its business consists of carrying passengers in trolley cars on said Eads Bridge from the State of Illinois into the State of Missouri, or from the State of Missouri into the State of Illinois, and all of its property is used as a necessary means of carrying on such business, then defendant is engaged in interstate commerce only, and its property, including that which lies on said bridge within the territorial limits of Missouri, is used in interstate commerce only, and any assessment or tax against
61 defendant by the State of Missouri would be void and the judgment in this case should be for the defendant.

The Court, of its own motion, gave the following declarations of law, to the making of which the defendant then and there excepted at the time.

Court's Declarations of Law.

C-3.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that in the amount sued for in this case any illegal tax is inseparably included, then plaintiff is not entitled to recover any amount in this case, unless by tender and payment into court defendant admits a part of the sum sued for is due and payable.

C-6.

(Caption Omitted.)

The Court declares the law to be that if it appears from the evidence that the tax bill sued on in this case is not authenticated by the certificate of the Collector or filed with the petition, then such tax bill or bills cannot be regarded as any evidence, or, if it appears that all or any of them are not based on a legal assessment, then they

cannot be considered any evidence, unless a proper certification and legal assessment is shown by the agreed statement of facts.

C-9.

(Caption Omitted.)

The Court declared that the statute requires the State Board
62 of Equalization to keep a full and fair record of its proceedings and decisions to the end that parties assessed may know just what property was assessed and how it was assessed; and if it appears from the evidence in the case that greatly different values were placed upon property described in the same identical manner; and if it further appears from the evidence that the defendant had and used at all the times in controversy substantially the same property (with exception of money in deposit in bank); and if it further appears from the evidence that no reasonable explanation for said discrepancies in valuation is to be found expressly or by reasonable implication from the record made by said State Board of its proceedings and decisions, and that said record is not a true record of their proceedings and decisions, then the plaintiff cannot recover and the judgment should be for the defendant in each case. But the board is not required to classify or describe property assessed other than it is classified and described by statutes and a substantial compliance with the statute or a classification and description based upon statements furnished by the taxpayer is sufficient.

C-10.

(Caption Omitted.)

The Court declares that double taxation is prohibited by the Constitution and laws of Missouri, and if it appears from the evidence that the St. Louis Bridge Company was the owner and was assessed and paid taxes on any tangible or intangible property, any part of which was again assessed against this defendant, then said assessment against defendant as to said part so doubly assessed is illegal and
void, and the plaintiff cannot recover of defendant any tax
63 based thereon; and if it further appears from the evidence that there is such illegal taxes included in the amount sued for and that it is so intermingled that it cannot be with certainty separated therefrom, then the plaintiff is not entitled to recover against the defendant in any amount.

Thereafter, to wit, on the 22nd day of December, 1916, it being one of the days of the December Term, 1916, the Court rendered judgment in favor of the plaintiff for the face of the tax bill and penalties for eight years and eleven months and for attorneys' fees, and filed said written declarations of law, respectively marked "given," "modified given" and "refused."

And thereafter, within four days on, to wit, the 23rd day of December, and during the said December, 1916, Term of said court, the defendant filed its motion for a new trial, which is in words and figures following, to wit (caption omitted):

Motion for New Trial.

Now comes the defendant in the above-entitled cause and moves the Court to set aside its findings and judgment rendered in said cause on the 22nd day of December, 1916, and to grant it a new trial, for the reasons:

(1) That the findings of the Court are against the facts contained in the agreed statement of facts heretofore filed herein, and upon which this case was submitted; and said findings are against the weight of the legal evidence contained in said agreed statement of facts.

(2) That the findings and judgment of the Court are against the law.

64 (3) That the findings and judgment of the Court are against the law and the relevant and material facts contained in said agreed statement of facts.

(4) That the Court erred in rejecting material and relevant facts and evidence contained in said agreed statement of facts tending to prove defendant's contentions.

(5) That the Court erred in admitting irrelevant and immaterial facts and evidence contained in said agreed statement of facts which plaintiff claims tends to prove his contentions.

(6) That the Court erred in overruling defendant's objections to certain facts offered by plaintiff as evidence.

(7) That the Court erred in refusing defendant's request to declare the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover in the above-entitled case and the finding and judgment of the Court must be for the defendant.

(8) That the Court erred in refusing proper declarations of law asked by the defendant and marked 1, 2, 7, 8, 11, 12, 13, 14, and in refusing in the form submitted proper declarations of law asked by the defendant and marked 3, 6, 9, 10.

(9) That the Court erred in making improper declarations of law on behalf of plaintiff.

(10) That the declarations of law marked C-3, C-6, C-9, C-10, as modified and as given by the Court of its own motion, are erroneous.

(11) That the Court erred in not finding that the tax sought to be collected is double taxation, and in violation of the Constitution and laws of the State of Missouri and therefore void.

(12) The Court erred in not finding that the attempted
65 assessment and taxation in this case is unjust discrimination against defendant and in violation of the Constitution and laws of the State of Missouri and therefore void.

(13) The Court erred in not finding that the attempted assessment and taxation in this case is a direct burden upon and interference with interstate commerce and in violation of the Federal Constitution and laws and therefore void.

(14) That the judgment is for the wrong party.

DAWSON & GARVIN,
Attorneys for Defendant.

And thereafter, to wit, on the 29th day of December, 1916, during said December, 1916, Term of said court, plaintiff filed its motion to modify said judgment, which motion is in words and figures following, to wit (caption omitted):

Plaintiff's Motion for Modification of Judgment.

Comes now the plaintiff and prays the Court to modify the judgment entered herein by increasing the amount allowed plaintiff for attorneys' fees.

Plaintiff states that the services rendered by plaintiff's attorneys herein in this Court are of the reasonable value of more than seven hundred and fifty dollars ($750.00), and plaintiff prays that the Court permit plaintiff to offer testimony as to the value of said services.

Plaintiff states that under the provisions of Section 11597, R. S. Mo. 1909, it is the duty of the Court to allow a reasonable attorney fee for services rendered in these cases. Plaintiff states that
66 the allowance herein made is grossly inadequate. That the Court erred in following Section 11497, R. S. Mo. 1909, in fixing said fee and in failing to allow a sum for attorneys' fees that would reasonably compensate plaintiff's attorneys for their services herein.

Wherefore, plaintiff prays that the Court modify its said judgment by allowing and taxing as costs the sum of seven hundred and fifty dollars ($750.00) for attorneys' fees instead of the sum allowed; and that if the Court is in doubt as to the reasonable value of said services that the Court hear testimony as to the value thereof and then fix the sum.

(Signed) THOS. L. RUTLEDGE,
Attorney for Plaintiff.

Which said defendant's motion for a new trial was by the Court, on the 29th day of December, 1916, and during the said December Term of the court, overruled; to which ruling and order of the Court in overruling said motion for a new trial, defendant then and there at the time duly excepted.

Plaintiff's motion to modify said judgment was by the Court, on the 29th day of December, 1916, and during the said December Term of said court, overruled without prejudice; to which ruling and order of the Court in overruling plaintiff's said motion to modify, plaintiff then and there at the time duly excepted.

Thereafter, on the 25th day of January, 1917, and during said December, 1916, Term of the court, defendant was by said court by an order duly entered of record allowed thirty days in which to file its bill of exceptions, and on the same day during said December, 1916,
Term of court, defendant filed its affidavit for an appeal and
67 paid the docket fee of $10.00 and an appeal was allowed defendant to the Supreme Court, and on the same day and during said December Term, defendant presented its appeal bond in the sum of $17,116.04, which was approved by the Court and filed.

On January 6, 1917, plaintiff filed his motion to retax costs, which motion to retax is in words and figures following (caption omitted):

Motion to Retax Costs.

Now comes the plaintiff and moves the Court to retax the costs in this case and to increase the allowance made to the attorneys for the plaintiff to one thousand dollars ($1,000.00); and for that purpose plaintiff states that this suit was filed on April 15, 1908, and that plaintiff's attorneys have rendered services in connection with this litigation since that time; that many important far-reaching and difficult legal problems were presented by the litigation and that plaintiff's attorneys spent many weeks of time in the preparation and trial of this case; that the investigation of the law, the preparation of office briefs and trial briefs involved the consideration of many intricate problems relating to taxation, interstate commerce and railroads, and required many weeks of time in the examination of authorities and the preparation of briefs.

That the attorneys for the plaintiff spent a great deal of time in connection with the preparation of an agreed statement of facts, which involved the examination of many intricate facts, records, and contracts and which covered twenty pages of typewritten matter.

68 The attorneys for the plaintiff had numerous conferences with the Attorney General, with the Collector and with the attorneys for the defendant relating to the litigation and policy to be pursued in connection therewith.

The attorneys for plaintiff presented the case by oral argument to the Circuit Court and again took up the matter by oral argument on the motion for new trial.

Plaintiff states that the questions and facts involved in this case are important and far-reaching to the City of St. Louis and State of Missouri, and involve the same questions that will be presented in a great many tax bills of a similar nature and that the judgment in this case is a precedent for other litigation now pending and to follow.

Plaintiff states that the services rendered by plaintiff's attorneys in the trial court are of the reasonable value of one thousand dollars ($1,000.00).

That under the provisions of Section 11597, R. S. Mo. 1909, it is provided that in case of suits of this nature, "the court in which suit is brought shall, if plaintiff obtain judgment, allow such attorneys a reasonable fee for bringing and conducting such suit, which shall be taxed against the defendant and paid as other costs in the case".

Plaintiff states that the original attorneys in this case for the plaintiff were the firm of Johnson, Houts, Marlatt & Hawes, who were afterwards succeeded by Johnson, Rutledge, Mariatt & Lashly, who were in turn succeeded by the plaintiff's present attorneys, Thomas G. Rutledge and J. M. Lashly.

Wherefore, plaintiff asks the Court to retax the costs in this case and to allow plaintiff's attorneys, Thomas G. Rutledge and
69 J. M. Lashly, the sum of one thousand dollars ($1,000.00) for the services heretofore rendered, with leave to the plaintiff to petition the Court later for additional fees to be taxed as costs, in the event that further services are rendered and an appeal taken from the judgment of this Court.

(Signed) THOMAS G. RUTLEDGE,
(Signed) J. M. LASHLY,
Attorneys for Plaintiff.

Thereafter, on, to wit, January 26th, 1917, said motion to retax was called up to be heard and the plaintiff in support of said motion offered testimony as follows:

THOMAS G. RUTLEDGE, of lawful age, first being duly sworn to tell the truth, the whole truth and nothing but the truth, on his oath on behalf of the plaintiff testified as follows:

My name is Thomas G. Rutledge; I am an attorney at law, practicing in the City of St. Louis for——

The Court: A good many years?

A. —a good many years; and the firm of Johnson, Houts, Marlatt and Hawes had represented the Collector of Revenue at the time this particular suit was brought. It was a suit against the St. Louis & East St. Louis Electric Railway Company for the collection of taxes assessed against that railroad and fixed by the Board of Equalization of the State of Missouri. The matter was continued from time to time by that firm, and they did some little work on it; but no particular progress was made. We then succeeded to the case, I having charge of it; and thereafter, I spent a great deal of time on the case. It involved some very intricate problems of law
70 and even more intricate questions of fact. I suppose, all told, if the time were computed together day after day, with days of six or seven hours for a working day that I spent six weeks on the case. Although there were two cases, three cases—two other cases, still this was the important case; this was the only case of the three that was perfectly regular; the others had certain irregularities about them and I dismissed one. The other was irregular and

we lost that case. But, in connection with this, I had to examine the law on a great many questions relating to taxation of railroads, and particularly to questions relative to what our opponents, the defendants, called was the taxation of interstate commerce. This railroad operated on the top of the defendant's bridge run from St. Louis to East St. Louis and it didn't own the bridge, but it had a contract from the bridge which was a very valuable thing; and the question involved was the right of this State to tax an instrument of interstate commerce, operating merely from this State to Illinois and carrying passengers only from one State to the other; not carrying them from this State to another point in this State. But counsel for the defendant were extremely ingenious, and the problems were knotty and numerous, as indicated by the fact that the original and supplemental brief filed by our opponents, I think, numbered in pages ninety; so that I was not able to get together quite so much, but I think I had together forty or fifty pages of the law; and prior to that I had a trial brief, because it was difficult to determine how many questions would be brought up; and, of course, as we went along many of them were eliminated. Then, on account of
71 the intricacy of the facts, we undertook to get together on the facts with an agreed statement. I drew myself an agreed statement, and Mr. Garvin did. And Mr. Garvin redrafted and I redrafted, and I suppose we spent—it took us two years, I think, to get that agreed statement fixed up; then it was twenty-five pages long. There were, of course, a great many conferences that we had with the Attorney General and Mr. Hadley, Governor Hadley, while still Attorney General; and, while Governor, with his successor as Attorney General, and as to many practical questions that were connected with this. These were the taxes for the year 1907. Suits for the taxes subsequent to that year are pending, and this suit is really a test case. I take it, to determine the liability.

The Court: For all time?

A. For all time for all the rest of the cases to come. The file I have here, which represents about two inches in thickness of papers, indicates the great accumulation of work that was done in the case. Then, we finally got it in shape for presentation, and it was presented and argued for the better part of a day. Before Judge Kinsey, a year ago. And thereafterwards briefed and rebriefed. Judge Kinsey decided the matter in December; motions for a new trial were filed——

The Court: December last?

A. December, 1916; and the matter was argued for half a day and briefs again filed, and we recovered judgment and established the principles that we were contending for, namely, that a railroad of this kind was subject to taxation, and that what Mr. Garvin called was the taxation of its franchises, but what we called something like this: We called it the taxation of property belonging to this corporation in the State of Missouri represented, if you will, by in-
72 tangible property, but, coming under that classification referred to in the statute as all other property was taxable. That established in this case and if the principle should be main-

tained, of course, it makes it easy sailing for the State of Missouri to collect taxes not only against this railroad company but others similarly situated; and I think that the services are reasonably worth one thousand dollars.

The Court: What was the amount of the judgment?

A. The judgment was $4,000, and some interest, though, amounted to $4,000; so there was a total judgment of about $8,000.

The Court: Do you desire to ask any questions, Mr. Garvin?

Mr. Garvin: No; I don't think we care to ask any questions, your Honor. Our position in the matter is this: The motion——

The Court: Well, just wait 'til he finishes. You have some other attorneys here to testify?

A. Yes.

FRANK H. SULLIVAN, of lawful age, first being duly sworn to tell the truth, the whole truth and nothing but the truth, on his oath on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Lashly:

Q. What is your name, please?

A. Frank H. Sullivan.

Q. You are an attorney at this bar?

A. Yes, sir.

Q. How long have you practiced at this bar, Mr. Sullivan?

A. Eighteen ninety-eight.

Q. Since 1898?

A. Yes.

73 Q. Did you hear the statements of Mr. Thomas G. Rutledge with reference to the services he rendered in connection with this case?

A. Yes.

Q. What, in your judgment, is a fair and reasonable value for the services rendered, as detailed by Mr. Rutledge on the witness stand as you have just heard them?

A. I think Mr. Rutledge, for the—very much understated the value of the services. I should say not less than $2,500, considering the time he has put in on it, the importance of the questions, both as to the present action and the future.

That's all. Thank you, Mr. Sullivan.

No cross-examination.

FRANK H. HASKINS, of lawful age, first being duly sworn to tell the truth, the whole truth and nothing but the truth, on his oath on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Lashly:

Q. What is your name, please?
A. Frank H. Haskins.
Q. Mr. Haskins, you are an attorney at law at this St. Louis bar, are you?
A. Yes.
Q. How long have you practiced at this bar?
A. Since '93.
Q. Continuously?
A. Yes.
Q. Did you hear the testimony of Mr. Rutledge with reference to the services he had rendered in this case?
A. I did.
Q. What is your opinion as to the value, the reasonable value as a charge for the services rendered by Mr. Rutledge? As he has
74 described them on the witness stand in your hearing.
A. I think his statement of a thousand dollars is reasonable.
Q. That would be a reasonable charge, in your opinion, would it?
A. I do.

Mr. Lashly: Very well, if you want to cross-examine him. Mr. Garvin?
That's all, Mr. Haskins.
No cross-examination.
Mr. Lashly: That will be all the testimony.
Mr. Garvin: If your Honor please, we haven't taken part as counsel in this matter for the reason that counsel for plaintiff filed a motion to modify at the time the motion for a new trial was filed by the defendant. We suggested to the Court that if the judgment was to be modified, the motion for new trial might also properly be sustained, and the whole judgment set aside; but the Court overruled both motions. And as counsel for plaintiff has said, the motion to modify was overruled without prejudice, and since that time an appeal has been taken. My idea is that this motion to retax is a part of the judgment; but if it is not then it is premature, inasmuch as the case has been appealed. Of course, if it's reversed and remanded, there's no action to take. If it's affirmed, why, then, there's time enough to take it up; but that's our attitude in the matter; for that reason we don't desire to take it up at this time.

And the above and foregoing was all the evidence offered or heard at said trial of said motion to retax costs.

And thereafter, on, to wit, February 1st, 1917, during said December, 1916, Term, plaintiff's said motion to retax costs was by the

Court sustained and plaintiff was allowed one thousand dollars
75 as attorneys' fees in this action to be taxed as costs in the case; to which ruling and order of the Court defendant then and there at the time duly excepted.

And thereafter, within four days, on, to wit, February 2nd, 1917, and during the same said December, 1916, Term of court, defendant filed its motion for a new trial of said motion to retax costs, which said motion for new trial is in words and figures following, to wit (caption omitted):

Motion for New Trial of Motion to Retax.

Now comes the defendant in the above-entitled cause, and moves the Court to set aside its order of date February 1st, 1917, sustaining plaintiff's motion to retax costs and allow plaintiff $1,000.00 as attorneys' fees, to be taxed as costs in the above-entitled case, and grant it a new trial for the reasons:

(1) That said action of the Court in sustaining said motion is against the law.

(2) That said action of the Court in sustaining said motion is against the evidence.

(3) That said action of the Court in sustaining said motion is against the law and the evidence.

(4) For the reason that a similar motion was made by plaintiff and passed on by the Court, on, to wit, December 29, 1916, and prior to the appeal granted to the defendant on, to wit, January 25, 1917, and said trial court had lost jurisdiction and had no power to alter or amend the judgment or to render a different judgment and the motion should have been dismissed.

(5) That Section 11597, R. S. 1909 (being Sec. 9378,
76 R. S. 1899) upon which said motion to retax is based, contemplates that the attorneys' fee shall be a component part of the judgment.

(6) That Section 11597, R. S. 1909 (being Section 9378, R. S. 1899) is unconstitutional.

(Signed) DAWSON & GARVIN,
Attorneys for Defendant.

Which said defendant's motion for new trial of motion to retax costs was by the Court, on said February —, 1917, and during said December, 1916, Term of court, overruled; to which action and ruling of the Court defendant then and there duly excepted.

And thereafter, on February 2nd, 1917, and during said December, 1916, Term of the court, defendant filed its affidavit for an appeal from said order sustaining plaintiff's said motion to retax costs

and an appeal was allowed defendant to the Supreme Court from said order.

Defendant therefore, prays the Court to allow and sign this bill of exceptions and that the same may be signed and sealed and made part of the record, which is done this 6th day of April, 1917.

WM. T. JONES,
Succeeding Judge of the Circuit Court, City of St. Louis, Missouri, Eighth Circuit, Division 5.

O. K.:
THOMAS G. RUTLEDGE,
Attorney for Plaintiff.

77 Division No. 5.

No. 8026.

No. 8027.

STATE OF MISSOURI ex Rel. HAGERMAN, etc.,

v.

ST. LOUIS AND EAST ST. LOUIS ELECTRIC RAILWAY CO.

Memorandum of Judge Kinsey.

While the Board of Equalization is required to keep a record of its proceedings and orders, yet that does not mean that the evidence which the Board hears and upon which it bases its orders shall appear of record. It is enough that its records show that there was laid before it the subject-matter of the assessment and equalization of taxes on property under its jurisdiction which is owned by persons or corporations named in the record, that the Board has duly considered the same, made an assessment and recorded its action in so doing. The agreed statements show that this was done in both cases alike. (Here follows a paragraph relating to the taxes for the year 1899.) The agreed statements show that the several certificate required to be made were made in fact by those authorized to make them, that each suit is based upon the original tax bill, and a copy thereof made a part of the agreed statements. The Court will presume that all the necessary steps in assessing the defendant's property for taxation and levying the tax thereon, as provided by law, were taken, including notice, that the assessments and levies are valid, and that the tax bills issued thereon are prima facie evidence of valid assessments and valid levies until the contrary is shown. It follows that any defense in these suits based upon insufficient records kept by the Board of Equalization or the absence of necessary certificates of incorrect rates must be ruled against the defendant.

(Here follows a paragraph which we omit as it relates solely to the other case No. 8026.)

78 Case No. 8027.

Adopted without repeating all that is said in the two preceding paragraphs which is applicable to this case, the only remaining question of any importance is whether the assessment and levy of taxes upon the property owned by the defendant June 1, 1906, is in whole or part a burden upon inter-state commerce. The tax in question is a property and not either a license or occupation tax.

The tangible property owned by the defendant was of small value compared with the value of its intangible property in both 1889 and 1906. In 1900 defendant had a bonded debt of $775,000 upon which it paid interest at the rate of 6%, and a capital stock of $250,000 upon which it paid a dividend for that year of 23.75%. In 1906 it had a bonded debt of $500,000 upon which it paid interest at the rate of 5%, and a capital stock of $500,000 upon which it paid dividends aggregating 17% for the years 1902 to 1907, both inclusive, or an average dividend of about 2.75%. The capital stock of the defendant represents the value of both its tangible and intangible property. As said by the Supreme Court of the United States in one of the cases cited in plaintiff's brief, the value of property is not to be measured by what it costs but rather by what it will produce in the way of income. Its value for the purpose of assessment and taxation is not affected by the fact that it is mortgaged to the extent of $500,000. In effect the defendant's property produced an income of about 7 1/2% on a valuation of $500,000 in 1906. The State Board valued the defendant's tangible property at the rate of $37,629.53 per mile, and its intangible property at the rate of $500,000 per mile, or the whole of it at the rate of $537,629.53 per mile. Reducing this total valuation per mile to the mileage of defendant's road, to-wit, .865 of a mile, gives $465,029.54 as the assessed value of the defendant's property for taxation. It is obvious that this assessment is based upon the value of the defendant's property as expressed by its capital stock, and

79 the earning power of that stock. Of the total assessed value, $186,019.98 is apportioned to the State of Missouri upon a mileage basis as representing the value of its property in this State for taxation. Of this last named sum $173,000.16 is classified in accordance with the statute as "all other property" and is evidently intended to represent the value of the defendant's intangible property in this State. Of what this intangible property consists is not disclosed by the record of the Board. The defendant's property east of our State line is of no value as a railroad except when used in conjunction with that west of the line and the converse is equally true. In no way could the value of the part in each State be ascertained except by using the mileage or unit rule. Prior to 1906 the defendant had acquired by contract an easement or right of way across the bridge for a term expiring forty-six years after that date, on tracks owned by itself though laid and maintained by the Bridge Co. It also owns and maintains its poles and trolley wires. This easement or right of way was intangible prop-

erty of great value, especially if it carried the exclusive right to use the tracks on the bridge. The defendant also owned at that time a franchise obtained from the State of Missouri to operate an electric street railway in this State, which was also intangible property. Whether only one or both of these kinds of intangible property was embraced in the item of $173,000, we are not informed. Both, however, must be represented by the capital stock of the defendant, otherwise the principal question submitted for decision is beside any issue in the case. While not so in name, the assessment in question appears to be based upon the defendant's capital stock. It is certainly based upon all of its property as represented by that stock. The defendant has made its intangible property a part of its capital. In what manner the taxation of its property in that form amounts to a direct tax upon its inter-state business, I am not able to perceive.

80 The Supreme Court of the United States, in the case of St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 365, l. c. appears to sum up the whole matter in a quotation from Atlantic, etc. Tel. Co. v. Philadelphia, 190 U. S. 160, as follows:

"The Court reviewing numerous previous cases laid down certain propositions as well established and among them the following: (*a*) No State can compel a party individual or corporation, to pay for the privilege of engaging in inter-state commerce; (*b*) this immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in inter-state commerce; and (*c*) the franchise of a corporation, although that franchise is the business of inter-state commerce, is a part of its property subject to state taxation provided at least the franchise is not derived from the United States."

The defendant is a domestic corporation and ought not to be allowed to escape taxation upon its tangible and intangible property in this State unless it clearly appears that the proposed tax is in contravention of the laws of the United States relating to inter-state commerce.

The validity of such a tax is to be adjudged by its effect. What other effect would the payment of this tax in 1907 have had except to reduce the dividend paid on the defendant's stock?

Upon the authority of the Supreme Court of the United States, as expressed in the decision just referred to, and State ex rel. Hammer vs. Ferry Co. 208 Mo. 622, I am satisfied the defendant is liable for the tax sued for in this case (8027), and judgment will be entered accordingly.

(Then follows a paragraph relating to the allowance of attorneys' fees, which is not important because followed by another ruling relating thereto.)

(Signed) W. M. KINSEY,
Judge.

In overruling appellant- motion for a new trial Judge Kinsey filed another written opinion which is as follows:

81 Division 5.

No. 8027.

STATE ex Rel. HAGERMAN

vs.

ST. LOUIS AND EAST ST. LOUIS ELECTRIC RAILWAY CO.

Memorandum of Judge Kinsey Overruling Motion for New Trial.

I have time but for a brief statement of the grounds upon which the defendant's motion for a new trial is overruled.

The big outstanding question in this case is, does the state tax sought to be enforced in this suit against the defendant invade the exclusive powers given by the Constitution of the United States (sec. 8, art. 1) to the Congress "to regulate commerce with foreign nations and among the several states and with Indian tribes"? In the determination of this question the nature or character of the tax sought to be enforced and the purpose for which it was levied must be considered. On the face of the proceedings taken by the State Board of Equalization under the law of this State the assessment and levy of the tax in question unmistakably indicates that it is a property tax levied upon the property of the defendant within this state, and not a tax to regulate its business as an inter-state carrier of passengers for hire.

The next consideration is whether, although a tax upon property in form is it in fact a tax intended to regulate the inter-state commerce in which the defendant is engaged. There is nothing in the case showing or tending to show that such was the purpose. Is there anything in the case showing or tending to show that such would be the effect of the tax if enforced, although not so intended? If, as said, it is a property tax only, assessed against and levied

82 upon the property of the defendant within this state, whatever effect, if any, it has upon the business of the defendant is not such a regulation of its business as brings the tax within that class prohibited by the Constitution of the United States.

The rule laid down by the Supreme Court of the United States in Atlantic etc. Telegraph Co. vs. Philadelphia, 190 U. S. 163, l. c., that "this immunity (from state taxation) does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory and employed in inter-state commerce," has been firmly established and remains unshaken, and, since no case has been cited holding that a corporation engaged only in inter-state commerce and doing no intra-state business is wholly exempt from taxation upon its property located within a state through which such business is done, this court holds that such immunity does not exist.

None of the cases undertake to separate property used in intra-state commerce from that used in inter-state commerce by the same owner. The right of a state to tax property found within its bordens

is coupled with the duty to afford protection to such property through its governmental agencies. The property of the defendant located within this State is safeguarded by and under the protection of the law of this State. The City of St. Louis, as one of the governmental agencies of the State, affords the defendant protection against all trespassers and wrong committed against its property in this State. It also affords protection against loss by fire and in every other way that the property of a citizen located in this State is safeguarded and protected by laws.

Was the assessment and ascertainment of the value of the defendant's property within this state in conformity with the law as pronounced by the Supreme Court of the United States and the Statute law and the decisions of the Supreme Court of this State?

The answer to that question must be in the affirmative.

83 In consideration of the question just discussed I have made a critical examination of the agreed statement of facts in its bearing, both upon that question, and the one other question now to be considered. Is there anything in this case warranting the conclusion that this case is one of double taxation, that is to say, has any of the property sought to be taxed in this case as against the defendant been taxed as against the Bridge Company and the tax paid by it?

Money, rolling stock and intangible property owned by the defendant certainly has never been taxed as property of the Bridge Company. The agreed statement shows that the bridge as constructed has two decks or roadways, the lower one for steam railroads and the upper deck a foot and wagon roadway. The bridge was designed, constructed and originally intended to be used for these two purposes. It was not until July, 1889, that the upper deck was used for street railway purposes, and said deck made, as it were, a roadbed for rails over which electric street cars were propelled. At that time and until at least 1902, the defendant was the owner of the rails resting on the upper deck of the bridge. It also then owned and still owns the trolley poles and trolley wires necessary for the operation of its cars. Neither the rails as laid nor the trolley poles and trolley wires used by the defendant is a necessary adjunct to the upper deck of the bridge as a foot and wagon roadway, but an essential adjunct to the business of the defendant. The defendant claims that under the new agreement entered into in April, 1902, it parted with ownership in the rails, the language of the agreed statement upon which that claim is based, is as follows: "Under said agreement the said Terminal Association (assignee of a lease granted by the Bridge Company) retains ownership and control of the tracks over which said trolley cars are to be run for passenger traffic only." This does not show ownership in the Bridge Company, said it is doubtful if it shows any ownership in fact
84–87 in the Terminal Company, which could not well retain ownership in something that it never owned.

In the classification of the defendant's property the State Board assessed its roadbed and superstructure, including side tracks, at $5,000 per mile, or the part thereof in this State at the sum of $1,730 dollars. The sum of $5,000 per mile is not suggestive of any

other than an extremely low valuation. The value of the trolley poles and trolley wires might well equal that sum per mile without taking into account the value of the rails, which might also well be more than $5,000 per mile. It is quite evident that the State Board used the phrase "roadbed and superstructure" as a stock phrase applicable to railroads generally. Whether the valuation at $5,000 per mile was intended to include both poles and wires and the rails, we are not informed except by the use of the phrase just quoted. If the Board was informed of the facts as they appear in the agreed statement they might have concluded that the rails were still owned by the defendant as well as the poles and trolley wires, but controlled by the Terminal Company; or, if they should have yielded to the contention of the defendant, they could not have found ownership except in the Terminal Company.

So the sum of the whole matter is that property may have been assessed as that of the defendant which belonged to the Terminal Company, but not to the Bridge Company. With this degree of uncertainty as to what precise tangible property was assessed by the Board at $5,000 per mile, and the uncertainty as to who in fact owned the rails in 1906 constituting the roadbed of the defendant, the Court may well rely upon the presumption that whatever was done in fact by the State Board was rightly done in view of the evidence before it. And also upon the presumption which the tax bill carries.

I conclude, therefore, upon a review of the whole case that the defendant's motion for a new trial should be overruled.

(Signed) WM. M. KINSEY,
Judge.

88 And thereafter, on the 19th day of April, 1919, the following further proceedings were had and entered of record in said cause, to wit:

No. 20171.

STATE ex Rel. JAMES HAGERMAN, JR., Collector, Respondent,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO., Appellant.

Come now the said parties, by their attorneys, and after argument herein, submit this cause to the Court.

And thereafter, on the 9th day of July, 1919, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri,
Division No. 1.

20171.

STATE OF MISSOURI, at the Relation and to the Use of JAMES HAGERMAN, JR., Collector of the City of St. Louis, in the State of Missouri, Respondent,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellant.

Appeal from the Circuit Court, City of St. Louis.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution. (Opinion filed.)

And on the same day, to wit, the 9th day of July, 1919, was filed the opinion of said Supreme Court in said cause, which said opinion is in the words and figures following, to wit:

59 In the Supreme Court of Missouri, April Term, 1919, Division One.

THE STATE OF MISSOURI ex Rel. JAMES HAGERMAN, JR., Collector, City of St. Louis, Missouri, Respondent,

v.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellant.

Opinion.

1.

This is a suit by the Collector of the City of St. Louis for taxes for the year 1907, assessed by the State Board of Equalization against .364 of a mile of railroad, owned and operated by the defendant corporation in the city of St. Louis.

The case was submitted to the trial judge, a jury being waived, upon an agreed statement of facts. The finding and judgment of the court were rendered in favor of the plaintiff for taxes and interest in the sum of $8,376.19, to which was added one thousand dollars attorneys' fee, allowed and taxed as costs.

Defendant duly appealed.

The agreed statement of facts, or so much thereof as is pertinent, will be stated in connection with the rulings made upon the errors insisted upon in the brief and argument of appellant.

90 II.

It is claimed that plaintiff failed to prove the case stated. The defendant procured a charter from the state of Missouri in the year 1889, as a railway company, with its western terminus in Missouri and an eastern terminus in Illinois. It has exercised the franchise granted thereunder by entering into contracts with the St. Louis Bridge Company, a corporation organized in Missouri and Illinois and the owner of a toll bridge known as the Eads Bridge, extending from the city of St. Louis, Missouri, to the city of East St. Louis, Illinois; the Missouri Pacific Railroad Company and the Wabash Railway Company, by virtue of which contracts the defendant, in consideration of a certain division of the fare collected from passengers which it should transport across the upper deck of said bridge, was permitted to operate thereon electric trolley cars. In April, 1902, these contracts were cancelled and a new one made by defendant with the Terminal Railroad Company of St. Louis which had previously acquired the leasehold of said bridge. This "said substitute agreement is of date April 11, 1902, and permits defendant to operate electric cars on the upper roadway of said bridge for fifty years unless sooner terminated by said Terminal Company." Two connecting street railways, both Illinois corporations, are made parties to this contract, the object of their joinder being to secure to the passengers carried by them a continuous passage over defendant's electric trolley car railroad running over said bridge and terminating in St. Louis, Missouri. In this connection the agreed statement of fact further recites:

"Under said agreement the said Terminal Association retains ownership and control of the tracks over which said trolley cars are to be run for passenger traffic only; said passengers are to be carried for a certain division of the fare of not less than five nor more than ten cents per passenger, as determined by said Terminal Company
91 to be paid by said bridge passengers for riding across said Eads Bridge, said electric cars to be run between the termini of said bridge; and for refusal, inability or failure of the other parties to direct travel destined to pass by way of East St. Louis to or from said city of St. Louis exclusively to said Eads Bridge, or to keep the other conditions of said agreement, said Terminal Company reserves the right to declare said agreement terminated and canceled."

The defendant company was incorporated originally for $100,000. Its capital stock was subsequently increased to $250,000 in 1890, and in 1902 to $500,000. Its bonded indebtedness is $500,000, on which it pays five per cent interest, and has always paid dividends on its stock.

The tax bill sued on contains itemizations according to the statute of the nature and valuation of defendant's property and the rate of taxation levied thereon for that year, showing the aggregate amount

sued for. The original bill was not filed, but a copy, admitted to be correct, was filed with the petition. The petition is substantially in the form prescribed by section 11593 of the Revision of 1909.

In assessing the property of defendant for the year 1907, the Board of Equalization specified the value of its passenger cars, its money on hand, the proportion of its rolling stock in this state, the proportion of its roadbed and superstructure in this state, and lastly "all other property" at $8,000.4625 per mile, which last item, computed at the length of the road in this state, amounted to $173,000.16. The addition of all the items at $186,019.98, is the basis of the taxes levied.

The agreed facts show that at the time of this assessment defendant "owned property in the state of Missouri consisting of certain poles and overhead trolley wires erected and maintained on the west
92 end of said Eads Bridge as a necessary working part and continuation of other poles and overhead trolley wires erected and maintained on the east or Illinois end of said bridge, all under said agreement of July 26th, 1889, and said substitute agreement, and also $26,524.55 on deposit on June 1st, 1906, in — Bank of the city of St. Louis, Missouri, which was proceeds of said business done on said bridge under said agreements and also two cars valued at $850.00 each."

The property, tangible and intangible, owned and operated in this state by defendant, possessed great value and earning power and to provide for its taxation, the statutes relating to the taxation of franchises other than that of corporate entity, were enacted. (Laws 1901, p. 232; R. S. 1909, Sec. 11551, 11552.) The method and plan of assessment and valuation prescribed in these statutes was scrupulously followed by the State Board of Equalization. The record of its action was filed with the Auditor. (R. S. 1909 Sec. 11573) whose certificate thereof is made prima facie evidence of the facts therein recited (R. S. 1909, Sec. 11578; State ex rel. v. Met. St. Ry. Co. 161 Mo. 188.) We think this and other evidence in the agreed statement of facts sufficed to make a prima facie case for plaintiff.

We have not overlooked the contention that the admittedly correct tax bill copied in the agreed statement was not filed with the petition. That is not required by the statutory form applicable to suits against railroads for delinquent taxes. (R. S. 1909, sec. 11593; State ex rel. v. Railroad, 113 Mo. 297.)

93

III.

It is insisted by appellant that the tax assessed in this case is void because double taxation, in that the bridge, subject to the easements evidenced by the contract under which defendant conducts and operates its electric railway, was also assessed for taxation against the grantors of the defendant.

It will be observed that in the assessment of the property of defendant the State Board of Equalization left out of view all of the structural elements essential to the purposes for which the bridge was built and the uses to which it was to be put, and confined its view exclusively to those things which were descriptive of the separable owner-

ship of the defendant under and by virtue of the contract possessed by it to operate and conduct its electric railway over the upper surface of the bridge, and those things which it had placed on the bridge to facilitate the operation of its electric trolley railway.

It is perfectly plain from the agreed statement of facts that the owners of the bridge were not the owners of the rolling stock, the metals or rails over which the trolley line ran, nor the right of user thereof, nor the trolley poles and wires, and it was these, coupled with the franchise value arising from the use and operation of them by the defendant railroad which the Board of Equalization intended to assess as the property of defendant. And it is equally clear that in its separate assessment of taxation on the bridge itself, against the owners thereof, the Board did not take cognizance of the property and franchises assessable to the owners of the trolley company.

There is nothing in this method of taxation which militates
94 against the doctrine stated in State ex rel. v. Railroad, 196 Mo. 553) where it was correctly held that a bridge as an entirely, having been taxed once, could not, without violating the constitutional principles forbidding double taxation, be taxed a second time against the lessor. In the case at bar the bridge as a bridge, embracing its multiform uses as such, was taxed against the owners thereof, but that assessment in nowise precluded the State Board of Equalization from making another assessment against the corporate grantee of a contract of user of a right of way from its electric trolley line over said bridge. The properties taxed were distinct and the ownerships were different, and there is nothing in the agreed statement of facts which shows that the Board of Equalization had in mind the values of the property belonging to defendant when it assessed the bridge property against its separate owners.

Our conclusion is that the action of the State Board of Equalization in levying the assessment sued for, did not contravene the constitutional inhibition against double taxation.

IV.

There is no merit in the contention of unjust discrimination in this case. Whether defendant is taxable depends wholly upon the provisions of sections 11551, 11552, of the Revision of 1909 (Laws 1901, p. 232). If those statutes are valid and applicable, then the taxes assessed against defendant in this case, were lawfully made, irrespective of the omission of the State Board of Equalization to make assessments under the same statutes against other railroads liable to assessment thereunder. The cases cited by appellant
95 on this point are wholly irrelevant in that they refer to the invalidity of a law or city ordinance, which, by its terms, was not uniform as to the same classes. Here there is no dispute as to the validity of the statutes requiring taxation of franchises, for the only point made is that the Board neglected to assess others liable under a valid law.

V.

Appellant insists that the tax assessment is illegal because the defendant owns no railroad franchises except the franchise to be a corporation, which is a non-taxable one. This is a misconception. The defendant does own railroad franchises other than that implied in that of a grant of a charter to it. It possesses, by the terms of its charter, the right to contract and operate a railroad. The bridge over which its track is laid is, in a general sense, a public highway. Under the Constitution of this state, its right to operate its street railway over the public highway (the bridge) could only be exercised by the consent of the local authorities having control of the highway proposed to be occupied by such street railway. (Const. Art. XII, sec. 20.) When it obtained this permission to operate its street railway on this public highway for fifty years, the legislative grant instantly became effective and vested in appellant a valuable franchise wholly distinct from its franchise of artificial entity, (State ex rel. v. Railroad, 140 Mo. l. c. 549) and one which is specifically assessable for taxation under the terms of the statutes providing for taxation of franchises. (State ex rel. v. Wiggins Ferry Co. 208 Mo. 622.) Proceeding under these statutes and in accordance with the method prescribed in a subsequent section (11559, R. S. 1909) the Board of Equalization assessed and adjusted the taxes laid on
96 defendant's franchises on a mileage basis and after the hearing of evidence, and in so doing it arrived at the conclusion that the value of the intangible property of defendant in Missouri was $173,000.16. It referred to this specific assessment as one made on "all other property" of defendant, a method of distinguishing the various items approved in State ex rel. v. Wiggins Ferry Co. (208 Mo. 622). In the present case, as has been seen, the franchise to operate a railroad resting primarily in legislative grant, became consummate when the consent to occupy the bridge for that purpose was obtained, for then it ripened into a legislative privilege and fell within the correct meaning of the term "franchise," which implies a privilege conferred by law to do that which "does not belong to the citizens of the country generally as a common right." (12 R. C. L. 173, sec. 1 et seq.; State ex rel. v. Weatherby, 45 Mo. l. c. 20.) According to the agreed facts this franchise vested in appellant, was a practical monopoly with a possible life of fifty years.

VI.

Nor are we able to concur in the view that in the assessment sued on in this case, the Board of Equalization undertook to tax property outside the jurisdiction of the state of Missouri. On the contrary the description of the property taxed, the itemization of amounts, discloses that they were referrable only to tangible and intangible property of defendant within the territorial limits of this state.

VII.

It is finally insisted by appellant that the taxation sued
97 upon is void under the Federal Constitution vesting in Congress the power to regulate interstate commerce and prohibiting the states from taking property without due process.

It is not within the power of the states to put a direct burden on interstate commerce, the exclusive regulation of which is granted to Congress by the Constitution of the United States (U. S. Const. Art. I, sec. 8). But this provision does not prevent the assessment of property situated in the several states because it is a part of a unified system which is appropriated to interstate commerce. In such cases the property "may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, (for) taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. (Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194; Adams Exp. Co. v. Kentucky, 166 U. S. 171; Fargo v. Hart, 193 U. S. 490.) So it has been held that a tax on property and business of a railroad operated within the state might be estimated prima facie by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. (Wisconsin & M. R. Co. v. Powers, 191 U. S. 379.) Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other
in the law of damages. The difficulty of distinguishing them
98 became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern." (Galveston etc. Railroad Co. v. Texas, 210 U. S. 217, 227.)

Under the agreed statement of facts appellant owned a usufruct in about one-third of a mile of railroad track on that portion of the bridge within the limits of Missouri. It also owned, as stated before, the rails, the superstructure and wires which enabled it to operate its trolley cars over this line. It also owned money on deposit in banks in Missouri; also the franchise of operating its railroad, granted to it by the legislature of the state, and consented to by the local authorities in charge of the bridge. All of this property was within the territory of this state and, therefore, its assessment for taxation did not impose a direct burden upon interstate commerce under the principles declared and the rule stated in the foregoing quotation from the opinion of the Supreme Court of the United States and the authorities therein cited. The imposition in the case at bar was purely a tax on property as such, locally situated and upon a Missouri franchise locally enjoyed. It was assessed in strict accordance with the provisions of the statutes of this state and the Board of Equalization, in making this assessment, was entitled to consider the

increase in value of the property assessed by reason of its being an integral part of a railroad engaged in interstate traffic, and they were entitled to discerp the value of the property in Missouri from that of the other property of which it was a part, in the manner prescribed in the statute providing for its assessment and sanctioned by the foregoing decision of the Supreme Court of the United States.

This, we think, was substantially done in the present case.

99 We find nothing in the agreed statement of facts which tends to show that this assessment was so laid as to take the property of appellant without due process.

Our conclusion is that the judgment of the trial court must be affirmed. It is so ordered.

Blair, P. J., and Graves, J., concur.

HENRY W. BOND,
Judge.

100 And thereafter, on the 19th day of July, 1919, said appellant filed its motion for a rehearing in said cause, which said motion is in the words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1919.

No. 20171.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, JR., Collector of the City of St. Louis in the State of Missouri, Respondent,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellant.

Appellant's Motion for Rehearing.

Now comes the appellant and respectfully moves the Court to grant it a rehearing, and for reasons for a reconsideration of the case and grounds for this motion, shows:

1. That questions decisive of the case and duly submitted
101 by counsel have been overlooked by the Court.

2. That the decision is in conflict with Article IX (Sec. 9387) and Article VIII (Sec. 9339) of Chapter 149 of Revised Statutes of Missouri 1899 making bridge companies and not railroads the owners for taxation purposes of interstate bridges and all facilities for the passage of steam or electric cars, although leased in whole or in part to a railroad company or companies "forever" or at will.

3. That the decision is out of line with decisions of this Court sitting in divisions and also in banc; and conflicts with controlling decisions of the United States Supreme Court, not called or not sufficiently called to the Court's attention through inadvertence of counsel for appellant.

I.

Decisive Questions—Assignments of Error and Facts Overlooked.

Referring more particularly to the papers showing the Court's oversight of questions and assignments of error entitling respondent to a reversal of the judgment of the trial court, and at least a remanding for a new trial under the law applicable to the decisive facts certainly determined, appellant shows that the trial court in arriving at its judgment in favor of respondent committed errors in admitting irrelevant and immaterial statements in the agreed statement of facts over appellant's objection, viz.: Clauses 17 (Rec., pp. 27-31), 25 to 28; (Rec., pp. 39-41); and in rejecting material and relevant facts, viz.: Clause 2 (Rec., p. 19); clause 11 (Rec., pp. 22-25);
102 clause 12 (Rec., p. 25); parts of clauses 18 and 20 (Rec., pp. 34-36), contained in and logically inferable from the agreed statement of facts, tending to prove defendant's contentions, all of which were duly called to the attention of the trial court by motion for new trial (Rec., p. 57), and of this Court by appellant's assignment of errors (Rec., pp. 11, 12), and were and are substantially to the effect that on June 1st, 1906, defendant owned no property except the license agreement of 1902 with the Terminal Company and the earnings therefrom being proceeds solely of interstate commerce conducted entirely on said bridge; that the Bridge Company was legally taxed on the use made of said bridge by defendant under this license agreement, including all the facilities thereon necessary to said use; and also was legally taxed on the use made of such bridge by the Terminal Company and its assignors, including all the facilities thereon necessary to said use; and said Bridge Company had paid said taxes so assessed and the Terminal Railroad and its assignors, members of the same taxing class with this defendant, had not been assessed on any use of or property upon said bridge.

The stipulation commonly called an agreed statement of facts does not constitute an "agreed case" under the statute or at common law.

State ex rel. Collector v. Malin, 159 Mo. 655.

The repugnancy between clause 14 of the agreed statement of facts quoted on pages 3 and 4 of the opinion as tending to show that defendant in 1906 owned tangible property on the bridge; and of
103 clauses 7, 8 and 27 (Rec., pp. 20, 21, 40, 41) of the agreed statement of facts overlooked by the Court and showing that in 1906 defendant owned no tangible property on the bridge is the result of inadvertence of counsel, owing to their attempt to prepare at the same time statements of facts for other suits for taxes for prior years for trial simultaneously by the trial court; as appears in part in respondent's brief at page 11.

Error in ruling on admission and rejection of facts and in declarations of law given and refused destroy the foundation of the finding and judgment of the trial court and entitles appellant to a new trial

as in case of a special verdict arrived at under erroneous rulings on evidence and instructions of the Court.

South Mo. Land Co. v. Combs, 53 M. A. 298;
Jewel Tea Co. v. Carthage (In Banc), 257 Mo. 383.

In this State an agreed case stands in lieu of a special verdict, and all the facts necessary to a determination of the case must be definitely ascertained. If there is any ambiguity, any omission of facts necessary to a recovery, any lack of clearness on material points the judgment will not be allowed to stand.

Gage et al. v. Gates, 62 Mo. 442.

The Court, speaking through Judge Sherwood, in the above case, says:

"We might, indeed, assume that the property attached was that of the husband and that the debts were his; but this is no case for assumption. We will not undertake to pronounce the law
104 until the facts on which the legal conclusions must be based, are definitely ascertained.

In order that this may be done and the case tried on its merits we shall reverse the judgment and remand the cause."

See, also, City of Stanberry v. Jordan, 145 Mo. 371, which involves the revenue laws, to same effect; and so construes R. S. Mo. 1889, Sec. 2304 (R. S. Mo. 1909, Sec. 2083) which provides that "when the facts in a special verdict are insufficiently found they may remand the cause and order another trial to ascertain the facts."

The opinion overlooks that the State Board added property "roadbed" and "rolling stock" that did not belong to defendant after 1902, and overlooks the case of State ex rel. Collector v. Cunningham, 153 Mo. 642, cited and quoted from in appellant's brief which decides that such facts in the record destroy plaintiff's prima facie case based on certificate of the auditor and voids the tax.

The Court also overlooks defendants' assignments of error Nos. 3 and 11, to the effect that while following the method and plan of assessment prescribed in Laws 1901, p. 232, R. S., §11551, 11552, the statement of facts shows that the board variously and arbitrarily valued identical property in different assessments showing its record is not true in fact as required by the law.

State ex rel. Collector v. Cunningham, 153 Mo. 642.

The Court overlooks the agreed fact that defendant, instead of procuring or using any other franchise from the State than the
105 right to be a corporation, made a pricate contract for license to carry bridge toll passengers in trolley cars wholly upon an interstate bridge, and never required or obtained any city ordinance to occupy any streets, alleys or rights-of-way in St. Louis or Missouri, and we respectfully submit that the opinion confuses mere rights and powers which belong to corporations and individuals alike with franchises which inhere in and must emanate from sovereignty alone.

12 R. C. L. 175.

The Bridge Company alone had the right to permit the use of its toll bridge by others in any manner.

The Bridge Company and any private corporation or individual were free to contract with respect to said use. The distinction between franchise and usufruct license or easement is real. A franchise is not personal, temporary or revocable, like defendant's contract.

Owensboro v. Amberland Tel. Co., 230 U. S. 58;
Boise Water Co. v. Boise City, 230 U. S. 84.

The franchise for taking toll for crossing the river on the Eads bridge belonged to the St. Louis Bridge Company and is taxed against it.

When a bridge company grants a person or corporation its consent to use the bridge, how can it be said that, if it is a corporation, it ripens into a franchise, when plainly it does not in the case of an individual?

The Bridge Company is in no sense a political agent or division of the State. No right granted by it can be said to emanate from the sovereign State or become a franchise.

106 The Bridge Company's right to span the river between states comes from the act of Congress. The right of defendant to use the bridge in any way comes from the Bridge Company. Defendant's sole business being interstate, its right to do that business as a corporation or individual cannot be legally taxed by the State of Missouri.

Gloucester Ferry Co. v. Pa., 114 U. S. 196.

The opinion does not discuss or pass on all of appellant's contentions, arguments and authorities in support of the defense that the tax as assessed is a direct burden on interstate commerce.

The fact that defendant is engaged solely in interstate commerce and did no intrastate in Missouri is not once mentioned in the opinion, although it is urged as the distinguishing feature of this case; and although the relation of the tax (whether a so-called general property tax, as in the Fargo case, a tax on gross earnings, capital stock tax or any other state tax for purposes of revenue) to intrastate business earnings, etc., is presented as a determinative fact.

In Postal Tel. Co. v. Richmond, 249 U. S. 252; Advance Sheets No. 3, May 5, 1919, it is held that:

"Where a State requires a telegraph company to engage in intrastate business, and taxes that business, so that payment, if compelled, must come in part from receipts from interstate business, ensemble, that the tax must be declared invalid; but only if the incidence on interstate commerce is shown by clear and convincing evidence."

107 The Court, speaking through Mr. Justice Clarke, of the license tax "for revenue purposes", says (p. 258):

"This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax re-

sults, it is argued, in imposing a burden upon its interstate business for the reason that the net receipts from its intrastate business are insufficient to pay the tax, and therefore payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted it well might be that this tax would be invalid (Pullman Co. v. Adams, 189 U. S. 420; Williams v. Talladega, 226 U. S. 404, 416, 417)."

Slight mileage, small proportion of its property and no intrastate business in Missouri were the determinative facts upon which the United States Supreme Court, on error to this court in Union Pac. R. R. Co. v. Public Service Commission of the State of Missouri, held the fee tax a direct unconstitutional interference with interstate commerce, and reversed the judgment of the State Court (268 Mo. 641); 248 U. S. 67; Advance Sheets, Jan. 5th, 1919.

The Court, speaking through Mr. Justice Holmes, says (p. 69):

"On these facts it is plain on principles now established, that the charge which in accordance with the letter of the Missouri statutes was fixed by a percentage on the total issue (of bonds) contemplated was an unlawful interference with commerce among the states (Looney v. Crane Co., 245 U. S. 178, 188; International Paper Co. v. Mass., 246 U. S. 135)."

108 The opinion overlooks appellant's assignments of error 17 and 18 (Brief, pp. 12, 9, 10) respecting retaxing costs and increasing attorney's fees (Rec., pp. 15-17; 59-70).

II.

Opinion Conflicts With Express Statutes.

The decision is in conflict with Article IX of Chapter 149 of the Revised Statutes of Missouri 1899, requiring all interstate bridges in entirety to be taxed against the Bridge Company as the owner within the meaning of taxation laws notwithstanding said bridge may be equipped with facilities for the passage of steam or electric cars and leased in whole or in part to a railroad company "forever" or at will (State ex rel. v. Bridge Company, 109 Mo. 253); and is in conflict with Article VIII, Chapter 149, R. S. Mo. 1899 and section 9339 defining the only kind of property assessable against railroad companies in terms excluding a lease, license or usufruct of an interstate bridge. No property is taxable in Missouri against railroads or individuals unless the law so declares and "It is not left to the tax assessor or tax collector to say what property or what interests in property are to be taxed."

State ex rel. v. Lesser en Banc, 237 Mo. 310, l. c. 318.

In Railway v. Williams, 53 Ark., 58, cited and approved in 109 Mo. 253, the Court says: "It is not the use that property is put to that determines to whom it is assessable.

109 In Cass County v. C., B. & Q. R. R. Co., 25 Nebr. 348, also cited with approval by this Court, supra, the Court says (p. 354):

"There is nothing, therefore, in the letter of the law which can be held to include the bridge in question. It is well known that the right to construct a bridge across a navigable stream as the Mississippi River is declared to be, cannot be obtained by any grant or authority of the State, the right to grant a license being vested alone in the general government, by an Act of Congress."

Following these and other citations, our Supreme Court, in 109 Mo. 253, says (p. 260):

"Our statute evidently intends such severance of bridges, held as is this one, for reasons of public concern, which it is not our province to question. Our duty is merely to give effect to such intentions lawfully expressed, we conclude that that portion of this bridge indicated by section 7757 (Sec. 9387, R. S. 99) is subject to be taxed as the property of the Mississippi River Bridge Company under Section 7755 of the Revenue Law of 1889" (R. S., Art. IX, of Chapter 149 of 1899).

The usufruct, easement, lease or license agreement of the defendant is carved out of the Bridge Company's rights in the bridge structure and its uses as such. So, also, were the leases to the steam railroad companies.

Thereafter, as before the State Board of Equalization, as required by law, continued assessing the Bridge Company, after these lesser estates, interests or rights had been carved out of the fee, at
110 the same or higher valuation (Rec., pp. 22-25), and did not assess the lessee steam railroad companies or any of them on their lease of said bridge or on any roadbed and superstructure or rails thereon or include in any way this length of bridge in the mileage of said steam railroad (Rec., p. 25).

Parts of the agreed statement of facts showing this were ruled out by the trial court and is overlooked by this Court.

We beg leave to urge that such assessments against those steam railroads were in obedience to the express requirements of Article IX, Chapter 149, R. S. Mo. 1899, as heretofore consistently construed by the Supreme Court.

This Court has held that a lease even "forever" does not impair the ownership by the Bridge Company within the meaning of the revenue law (State ex rel. Collector v. Bridge Company, 109 Mo. 253).

Therefore, it is to be presumed by law and inferred from the statement of facts offered by defendant that the State Board assessed all the Eads Bridge and every part attached thereto including rails, tracks, roadbed and superstructure and the leasehold of the steam railroads and the license contract or usufruct of the defendant against the St. Louis Bridge Company.

Whence it follows that when the State Board assessed these steam railroads without including the length of the bridge or its use in

the miles of tracks in Missouri taxed against these steam railroads it was not an "omission" and the Board was not neglecting its duty but was obeying the law, which law equally includes defendant, if it is a railroad for taxing purposes. And we respectfully ask for
111 a reconsideration of our defenses that this attempted assessment so far as it relates to defendants' rights to and use of the bridge or any thing attached thereto is unauthorized by law and illegal and is furthermore double taxation and unjust discrimination between members of the same taxing class, if defendant is a railroad.

III.

Opinion is out of line with Missouri law previously decided by this court sitting in division and in banc.

We respectfully submit that the opinion conflicts with State ex rel. Collector v. Cunningham, Div. No. 1, 153 Mo. 642, as shown above; with State ex rel. Collector v. Lesser in banc, 237 Mo. 310, in that the opinion construes the general language of the Laws of 1901, p. 232, constitutional as to railroads doing both intrastate and interstate business as intended to apply also to railroads which do no intrastate, but only interstate business; with State ex rel. v. Wiggins Ferry Co., 201 Mo. 322, l. c. 627, 643, 651, in that it holds that the assessment under name "all other property" is good although consisting wholly of the private license agreement to cross the river over an interstate bridge, whereas this Court in Division No. 2 in said Wiggins Ferry case held that "if upon another trial if it should be shown that the assessment included the franchise of the Ferry Company or that of the connecting company then the assessment upon which the $30,000 item is based, if predicated upon the value of such franchises, is invalid."

112 Opinion Conflicts with Controlling U. S. Supreme Court Decisions.

With Fargo v. Hart, 193 U. S. 470, in that the opinion in the case at bar affirms a judgment for state taxes on an assessment in which the State Board adds an intangible value of $173,000 to alleged tangible property valued by it at less than $2,500 located wholly on the Missouri end of an interstate toll bridge and used entirely thereon and exclusively in interstate business, whereas the U. S. Supreme Court in the Fargo case held a tax, although in form a property tax, bad because the attempt was made by the State Board of Indiana to add an intangible value of $800,000 to tangible property worth only $8,000 located within the State and used in intrastate as well as interstate business.

With Galveston H. & S. A. Ry. Co. v. Texas, 210 U. S. 217, in that the opinion in the case at bar affirms a judgment for a state tax for more than five per cent of the gross earnings of a corporation doing interstate business only and entirely upon an interstate toll bridge by virtue of a license agreement with the Bridge Company,

to which judgment $1,000 is added as attorney's fees and taxed as costs, whereas the U. S. Supreme Court in the Texas case, supra, held that the statute of Texas imposing a tax upon railroad companies whose receipts include receipts from interstate business was a burden on interstate commerce, and as such violative of the commerce clause of the Federal Constitution; and that neither the state courts nor the legislatures, by giving a tax a particular name, or by the use
113 of some form of words, can take away the duty of this Court to consider the nature and effect of a tax, and if it bears upon interstate commerce so directly as to amount to a regulation it cannot be saved by name or form.

With Philadelphia Steamship Co. v. Pa., 122 U. S. 326, in that the opinion in the case at bar affirms a judgment based on an assessment "based upon the value of defendant's property as expressed by its capital stock and the earning power of that stock" and on the gross earnings (Rec., p. 39), admitted in evidence over appellant's objection, all of which value is derived solely from transporting persons only on an interstate bridge, whereas in the Steamship case, supra, the U. S. Supreme Court held a state tax on gross receipts of a steamship company incorporated under its laws, which are derived from the transportation of persons and property by sea between different states is a regulation with the exclusive powers of Congress under the Constitution and void.

With Covington & Cincinnati Bridge Company v. Kentucky, 154 U. S. 204, in that the opinion in the case at bar impliedly distinguishes a bridge from a ferry boat, holding that a usufruct in one-third of a mile of railroad track on that portion of the bridge within the limits of Missouri, the rails, the superstructure and wires necessary to the operation of a trolley car may be assessed for taxation without imposing a direct burden upon interstate commerce notwithstanding the determination (St. Louis v. Wiggins Ferry Company, 78 U. S. [11 Wall.] 423, 10 Mo. 780) that its ferry boats were not subject to taxation under the laws of Missouri; whereas, the United States Supreme Court in the Covington Bridge case,
114 supra (p. 218) holds that "both are, however, vehicles of such (interstate) commerce and the fact that one is movable and the other is a fixture makes no difference in the application of the rule" and cites Gloucester Ferry Co. v. Pa., 114 U. S. 196, which reversed the Supreme Court of the State upholding a tax imposed on the Ferry Company. In so doing, Mr. Justice Fields, delivering the opinion, says (pp. 202, 203):

"The Supreme Court of the State, in giving its decision in this case, stated that the single question presented for consideration was whether the company did business within the State of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there because it landed and received passengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business, namely, the receipt and land-

ing of freight and passengers, was transacted; that for such business it was dependent as much upon the one place as upon the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by purchase by virtue of the statutory will of the Legislature of New Jersey, so it could hold by lease the one in Philadelphia only by the implied consent of the Legislature of the Commonwealth; and, that, therefore, it was dependent equally, not only for its business, but its power to do that business, upon both states, and might, therefore, be taxed by both (108 Penn. St. 105, 116)."

115 But such reasoning is disapproved by the United States Supreme Court and the judgment of the State Court so upholding the state tax imposed on the Ferry Company was reversed, Justice Field using the following language (pp. 213, 214):

"These cases would seem to be decisive of the character of the business which is the subject of taxation in the present case. Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such thing as their transportation across the River Delaware. The transportation, as to passengers is not completed until, as said in the Henderson case, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And all restraints by exaction in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the executive power of Congress to regulate that portion of commerce between the states."

With South Covington & C. St. Ry. Co. v. Covington, 235 U. S. 537, in that the opinion in the case at bar in effect holds that defendant's operations—entirely on the Eads interstate bridge—is not interstate commerce beyond the power of the State of Missouri to tax whereas, the U. S. Supreme Court, in the Covington case, *supra*, held that the traffic carried on by a Kentucky street railway corporation in connection with an Ohio corporation operating on the Ohio side of the Ohio River in transporting passengers upon continuous and connecting tracks and cross an interstate bridge, where 75 to 80 per cent

116 of the passengers carried in the City of Covington are being transported between points in Covington, Kentucky, and Cincinnati, Ohio, by means of continuous trips and a single fare, and under practically the same management, is interstate commerce and that the City of Covington could not by ordinance restrict the number of passengers which the company may admit to its cars, which directly affects its interstate business, volume and earnings.

That part of the opinion (p. 10) which holds that the State Board of Equalization is entitled to consider increased value resulting from and commensurate (p. 3) with increased interstate business unmixed with intrastate business is in conflict with the test laid down in the case of St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350 (Appellant's Brief, p. 59); and K. C. & Ft. S. Ry. v. Kans., 240 U. S. 235 (App. Brf., p. 43); and Galveston H. S. A. R. Co. v. Texas, 210 U. S. 217 (App. Reply Brief, 14-16); and Gloucester Ferry Co. v. Pa., 114 U. S.

198 (App. Rep. Brf., 16, 17); and Railroad v. Ark., 235 U. S. 350 and Covington & C. S. Ry. Co. v. Covington, 235 U. S. 537 (App. Brf., 63, 64, 65.); and Fargo v. Hart, 193 U. S. 490 (App. Reply Brf., 12), all to the effect that where the amount of the imposition fluctuates with the volume of interstate business done it does bear upon commerce among the states so directly as to amount to a regulation in a relatively immediate way and it will not be saved by name or form.

In reaching its conclusion this Court has overlooked the fact (not to be found in the record of any of the cases cited by counsel and the Court) that defendant did no intrastate business in Missouri
117 and all its business is exclusively interstate, and all its earnings are the proceeds of interstate commerce.

The Supreme Court of the United States has never decided that a state for purposes of taxation, may discern the value of property located in the State, but used exclusively in interstate business, from the value of property located outside of the State as an integral part of a railroad or other agency engaged solely in interstate traffic; and the opinion is in conflict with the principle established by the U. S. Supreme Court that interstate traffic can only be taxed incidentally where it is necessary for the State to do so in fairly taxing the franchise of interstate carriers on intrastate business.

Respectfully submitted,

DAWSON & GARVIN,
Attorneys for Appellant.

And thereafter, on the 22nd day of August, 1919, said appellant filed its motion to transfer the said cause to the Court in Banc, which said motion is in the words and figures following, to-wit:

118 In the Supreme Court of Missouri, Division No. 1, Apr. Term, 1919.

No. 20171.

THE STATE OF MISSOURI at the Relation and to the Use of Jas. Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri, Respondent,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellant.

Motion to Transfer to Court in Banc.

Now comes the appellant and moves the Court to transfer this cause to the Court in Banc for the reason that a Federal question is involved in this case and was duly presented in the pleadings and the motion for a new trial in the trial Court and was also duly presented in the briefs of the appellant herein to this Court and that the Federal questions are presented to the Court in appellant's motion for

rehearing which entitles respondent to have this case transferred to the Court in Banc for a hearing as provided in Section 4 Article 6, Amendment of 1890, of the Constitution of the State of Missouri.

Wherefore appellant prays the Court to transfer said case to the Court in Banc as by the Constitution in such cases made and provided.

DAWSON & GARVIN,
Attorneys for Appellant.

Take notice that the above motion to transfer to Court in Banc will be made on Saturday, Aug. 23rd, 1919, or as soon thereafter as it will be heard.

Copy received and notice acknowledged Aug. 20th, 1919.

THOMAS G. RUTLEDGE.
J. M. LASHLY,
Attorneys for Respondent.

119 And thereafter, on the 1st day of December, 1919, the following order was made and entered of record in said cause to-wit:

In the Supreme Court of Missouri, Division No. 1.

2071.

STATE ex Rel. JAMES HAGERMAN, Jr., Collector, etc., Respondent,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO., Appellant.

Now at this day the Court having considered and fully understood the motion for a rehearing herein, and motion to transfer said cause to Court in Banc, heretofore filed by the said appellant, the Court doth order that said motions, and each of them, be, and the same are hereby overruled.

120 In the Supreme Court of Missouri.

No. 20171.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri, Plaintiff, Respondent and Defendant in Error.

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO., Defendant, Appellant and Plaintiff in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Missouri:

Comes now the St. Louis & East St. Louis Electric Railway Co., defendant, appellant and plaintiff in error feeling aggrieved and shows that in the records, proceedings and decisions and in the rendition of final judgment and orders in the above entitled case on the first day of December, 1919, in the Supreme Court of the State of Missouri, the same being the highest Court of said State in which a decision could be had in this suit, a manifest error hath occurred as shown and set forth greatly to the damage of said petitioner, the St. Louis & East St. Louis Electric Railway Co.

That, as appears in the records and proceedings, Federal questions are involved in that there was drawn in question the validity of a statute or statutes of the State of Missouri and of an authority exercised under the said state, on
121 the ground that said statutes (to-wit, R. S. Mo. 1899, §§ 9338-9344, 9353-9378, Laws of Missouri 1901, page 232, and Laws of Missouri 1905, page 269, all of which are now included in Sections 11551-11597, R. S. Mo. 1909, being Articles XI and XII of Chapter 117 entitled respectively "Taxation of Franchises" and "Taxation of Railroads, Railroad Cars and Street Car Companies") as construed and applied are repugnant to Section 8 of Article One of the Federal Constitution, in that they impose a direct burden on interstate commerce, said statutes being invoked in an attempt to tax your petitioner on the privilege of doing interstate business as such and on interstate passenger-carrying facilities located wholly upon an interstate toll bridge and used on said bridge and not beyond the Missouri end thereof solely in interstate commerce, and the decision of said State Court was in favor of the validity of said tax under said statute and said construction and application thereof, and against your petitioner, and the decision of said State Court amounts to a taking of petitioner's property without due process of law and is in conflict with the Fourteenth Amendment of the Constitution of the United States, all of which appears in the records and pro-

ceedings of the case and is specially set forth in the assignments of error filed herewith.

Wherefore, your petitioner, the said St. Louis & East St. Louis Electric Railway Co. prays that a writ of error be allowed and that the transcript of record, proceedings and papers upon which said judgment and orders were rendered and made, duly authenticated, be ordered sent to the Supreme Court of the United States sitting at Washington in the District of Columbia, under the rules
122 of such Court in such cases made and provided, in order that the same may be inspected and corrected in accordance with law and justice.

And your petitioner further prays for an order fixing the amount of bond your petitioner the defendant shall give and furnish upon said writ of error and that upon the giving of such security and approval of said bond all further proceedings in this case be suspended and stayed until the termination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

ST. LOUIS & EAST ST. LOUIS
ELECTRIC RAILWAY CO.,
By DAWSON & GARVIN &
WILLIAM E. GARVIN,
Its Attorneys.

Jany. 30th, 1920.

123 In the Supreme Court of Missouri.

No. 20171.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, Jr., Collector of the City of St. Louis, in the State of Missouri, Plaintiff, Respondent and Defendant in Error,

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO., Defendant, Appellant and Plaintiff in Error.

Assignments of Error.

Now comes the St. Louis and East St. Louis Electric Railway Co., defendant, appellant and plaintiff in error in the above entitled cause, and files the following assignments of error upon which it will rely upon its prosecution of writ of error in the above entitled cause from the judgment and decision of the Supreme Court of the State of Missouri.

1.

That the Supreme Court of the State of Missouri erred in refusing to grant defendant's (here plaintiff in error) appeal and reverse the judgment of the trial court on the federal questions in-

volved and in overruling on, to-wit, December 1st, 1919, appellant's motions for a rehearing and to transfer this case to Court in banc.

2.

That the said Court erred in holding that R. S. Mo. 1899, §§ 9338-9344, 9353-9378, Laws of Missouri 1901, page 232, and Laws
124 of Missouri 1905, page 269, all of which are now included in Sections 11551-11597, R. S. Mo. 1909 (being Articles XI and XII of Chapter 117, entitled "Taxation of Franchises" and "Taxation of Railroads, Railroad Cars and Street Car Companies," respectively), as applied and construed by the State Board of Equalization and the trial Court were constitutional and did not impose a direct burden upon interstate commerce in violation of Section 8 of Article One of the Constitution of the United States, and did not amount to a taking of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the said tax was assessed against property used solely in the transaction of interstate commerce, said property being situated entirely on an interstate toll bridge known as the Eads Bridge between St. Louis, Missouri, and East St. Louis, Illinois, and was levied against a corporation engaged exclusively in interstate business, all of which said facts appear in the agreed statement of facts.

3.

That the said Court erred in holding that the Laws of Missouri 1901, page 232, all of which are now included in Sections 11551-11552, R. S. Mo. 1909 (being Article XI of Chapter 117 entitled "Taxation of Franchises") as applied and construed by the State Board of Equalization and the trial Court were constitutional and did not impose a direct burden upon interstate commerce contrary to Section 8 of Article One of the Constitution of the United
125 States, and did not take defendant's (here plaintiff in error) property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States, the assessment of "all other property" provided for in said statutes and on which the tax sought to be collected was chiefly based having been arrived at by valuing in the manner set forth in the agreed statement of facts the only intangible property owned by defendant, to-wit, its privilege of doing an exclusively interstate business.

4.

That the said Court erred in holding that the aforesaid statutes and the tax assessed thereunder against the defendant (here plaintiff in error) do not constitute a burden on interstate commerce and deprive defendant of its property without due process of law contrary to Section 8 of Article One and the Fourteenth Amendment to the Constitution of the United States, in view of the facts set up in defendant's answer and established by the agreed statement of facts, that the line of street railway which is operated over the so-

called Eads Bridge exclusively in interstate commerce is not operated by defendant and the defendant owns no tangible property in the State of Missouri except cash in bank, the proceeds of an exclusively interstate business, and no intangible property in the State of Missouri except its right to operate cars over the said Eads Bridge exclusively in interstate commerce, the tracks and roadway over which said cars are operated being owned by the Bridge Company, and the cars and other equipment used in the operation of said line of street railway being owned by the other corporations which, under
126 contract with defendant, operate said line and said assessment having been arrived at by capitalizing the net earnings derived by defendant from the said exclusively interstate business, said net earnings being an agreed percentage of the gross earnings of that business.

5.

That said Court erred in holding that the aforesaid statutes of the State of Missouri as applied and construed by the State Board of Equalization and the trial Court so as to include for taxation in Missouri the cars operated over said railway did not deprive the defendant (here plaintiff in error) of its property without due process of law and did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the cars were not located in the State of Missouri for purposes of taxation, the agreed statement of facts establishing that the power-house and car sheds of the defendant corporation were built on the Illinois side of the Mississippi River and the cars, even though owned by defendant, which defendant denies, were kept on the Illinois side except when in use running back and forth from one end of said bridge to the other.

6.

That the said Court erred in upholding the tax assessed by the State of Missouri as not constituting a burden on interstate commerce and not depriving defendant (here plaintiff in error) of its prop-
127 erty without due process of law, in conflict with Section 8 of Article One and the Fourteenth Amendment to the Constitution of the United States, in view of the facts and circumstances under which said tax was assessed, all as set forth in defendant's (here plaintiff in error) answer and established by the agreed statement of facts under which the case was tried.

7.

That said Court erred in affirming the judgment of the trial Court in refusing to give defendant's (here plaintiff in error) Declaration of Law No. 12 as requested, as follows:

"The Court declares that any assessment or taxation by the State of Missouri, which imposes a direct burden upon interstate commerce, is in violation of the Federal Constitution and laws regulating interstate commerce among the several states and void and un-

collectible; and if it appears from the evidence that the defendant is solely engaged in interstate commerce and that its property of every kind or nature is used only as a necessary means of said interstate business, then the judgment in this case shall be in favor of the defendant."

8.

That said Court erred in affirming the judgment of the trial Court in refusing to give defendant's (here plaintiff in error) Declaration of Law No. 13, as requested, as follows:

"The Court declares the law to be that the actual situs of personal property and not the domicile of the owner determines under the law of what State, if any, it shall be taxed, and if it appears from the evidence that at the times in controversy the power house and car sheds of the defendant were built in the State of Illinois and the trolley cars were kept on the Illinois side of the river
128 except when in transit running back and forth from one end of said bridge to the other, then defendant's said trolley cars can only be taxed by the State of Illinois, if taxable by any State, and in no event can they be taxed by the State of Missouri, and their assessment and taxation in the case is void and plaintiff cannot recover that part of the taxes sued for in the case."

9.

That said Court erred in affirming the judgment of the trial Court in refusing to give defendant's (here plaintiff in error) Declaration of Law No. 14 as requested, as follows:

"The Court declares that the statutes of Missouri respecting taxation do not in terms apply to interstate commerce and it is not to be implied that the Legislature of Missouri intended to transcend its constitutional powers of taxation; or to tax interstate commerce directly or indirectly or lay any burden upon it; but such statutes should be construed as applying only to the intrastate or local or domestic part of the business or property of corporations or persons engaged in interstate as well as intrastate commerce; and if it appears from the evidence that the defendant does no intrastate business, that is, business which is both begun and ended within the territorial limits of the State of Missouri, but that all of its business consists of carrying passengers in trolley cars on said Eads Bridge from the State of Illinois into the State of Missouri, or from the State of Missouri into the State of Illinois, and all of its property is used as a necessary means of carrying on such business, then defendant is engaged in interstate commerce only, and its property, including that which lies on said bridge within the territorial limits of Missouri, is used in interstate commerce only, and any assessment or tax against defendant by the State of Missouri would be void and the judgment in this case should be for the defendant."

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10.

That the said Court erred in overruling appellant's (here plaintiff in error) Fourteenth Assignment of Error as follows:

"In not finding that the attempted assessment and taxation in the case is a direct burden upon and interference with interstate commerce and in violation of the Federal Constitution and laws and therefore void."

11.

That the said Court erred in overruling appellant's (here plaintiff in error) Fifteenth Assignment of Error, in so far as such assignment presents a Federal question, as follows:

"In not finding that the attempted assessment and taxation in the case is, at least in part, beyond the jurisdiction of the State of Missouri to tax and is in violation of the Constitution and laws of Missouri and also is in violation of Federal laws and the Fourteenth Amendment of the Federal Constitution prohibiting the State from taking property without due process of law."

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the Supreme Court of the State of Missouri may be reversed, etc.

Dated, the 30th day of Jan'y, 1920.

DAWSON & GARVIN AND
WILLIAM E. GARVIN,
Attorneys for St. Louis & East St. Louis Electric Railway Co.

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Copy.

In the Supreme Court of Missouri.

No. 20171.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO., Plaintiff in Error,

vs.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, JR., Collector of the City of St. Louis in the State of Missouri, Defendant in Error.

Bond for Prosecution of Writ of Error to the Supreme Court of the United States.

Know all men by these presents that we, the St. Louis & East St. Louis Electric Railway Co. as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the

above the State of Missouri at the Relation and to the use of Jas. Hagerman, Jr., Collector of the City of St. Louis in the State of Missouri in the sum of $18,791,00 lawful money of the United States to be paid to the said State of Missouri at the relation and to the use of Jas. Hagerman, Jr., Collector of the City of St. Louis in the State of Missouri for the payment of which well and truly to be made, we bind ourselves and each of us, jointly and severally and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 9th day of January, in the year of our Lord 1920.

Whereas the above named St. Louis & East St. Louis Electric Railway Co. has prosecuted a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri to reverse a judgment and decree rendered by the Judges of the Supreme Court of the State of Missouri in the above entitled cause.

Now therefore, the condition of this obligation is such that, if the above named St. Louis & East St. Louis Electric Ry. Company shall prosecute said writ of error in effect, and answer all damages and costs, if they fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO.,

[SEAL.] By L. S. HAYNES,
President.

Attest:
F. W. GREGORY,
Ass't Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,

[SEAL.] By OSCAR L. KINCHELOE,
Resident Vice President.

Attest:
GEO. E. EGGER,
Resident Ass't Secretary.

Bond approved this 30th day of January 1920.

R. F. WALKER,
Chief Justice of Supreme Court of Missouri.

131 In the Supreme Court of Missouri.

No. 20171.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, JR., Collector of the City of St. Louis, in the State of Missouri, Respondent.

vs.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RY. CO., a Corporation, Appellant.

Order Allowing Writ of Error.

On reading of the petition of the St. Louis and East St. Louis Electric Railway Company, appellant (respondent) and plaintiff in error, for writ of error and the assignment of errors, and upon due consideration of the record of said cause:

It is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Missouri as prayed for in said petition that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioner for plaintiff in error, St. Louis and East St. Louis Electric Railway Company give security in the sum of Eighteen thousand seven hundred ninety one dollars ($18,791.00); that the plaintiff in error shall prosecute said writ of error, to effect, and, if said plaintiff in error fail to make said writ of error then he shall answer to the defendant in error for all damages and costs that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error, now presenting a bond in the sum of Eighteen thousand seven hundred ninety one dollars ($18,791.00) with American Surety Company of New York as suretys, it is ordered that the same be and hereby is duly approved and that the same shall act as a supersedeas bond.

In witness whereof I have hereunto set my hand this 30 day of January, 1920.

R. F. WALKER.
Chief Justice of the Supreme Court of the State of Missouri.

132 In the Supreme Court of the United States, October Term, 1920.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, Plaintiff in Error,

vs.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, JR., Collector of the City of St. Louis, in the State of Missouri, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Missouri before you or some of you, being the highest court of law and equity of the said state in which a decision could be had in the said suit between The St. Louis & East St. Louis Electric Railway Co., Appellant, and The State of Missouri at the Relation and to the use of Jas. Hagerman, Jr., Collector of the City of St. Louis in the State of Missouri, Respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the St. Louis & East St. Louis Electric Railway Co., as by its complaint appears.

133 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29th day February 1920 next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 30th day of January in the year of our Lord, One Thousand Nine Hundred and Twenty.

[Seal of the United States District Court, Central Division, Western District of Missouri.]

EDWIN R. DURHAM,
Clerk of the District Court of the United States for the Western District of Missouri, Central Division,
By H. C. GEISBERG,
Deputy.

Allowed by

R. F. WALKER,
Chief Justice of the Supreme Court of the State of Missouri.

134 In the Supreme Court of Missouri.

No. 20171.

St. Louis & East St. Louis Electric Railway Co., Plaintiff in Error,

vs.

The State of Missouri at the Relation and to the Use of Jas. Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri, Defendant in Error.

Citation.

United States of America, ss:

To the State of Missouri at the relation and to the use of James Hagerman, Jr., Collector of the City of St. Louis in the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within thirty days from date hereof, pursuant to a writ of error, filed with the Clerk of the Supreme Court of Missouri wherein the St. Louis and East St. Louis Electric Ry. Co. is plaintiff in error and you the State of Missouri at the Relation and to the use of Jas. Hagerman, Jr., Collector of the City of St. Louis in the State of Missouri, is defendant in error, to show cause, if any there be, why the judgment against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert F. Walker Chief Justice of the Supreme Court of the State of Missouri this 30th day of January, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Supreme Court of Missouri.]

R. F. WALKER,
Chief Justice of the Supreme Court of the State of Missouri.

Attest:
J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.
By PATRICIA NACY,
D. C.

Service of a copy of the foregoing citation hereby acknowledged this 31st day of January 1920.

THOMAS G. RUTLEDGE &
J. M. LASHLY,
Attorneys for the State of Missouri at the Relation and to the Use of Jas. Hagerman, Jr., Collector of the City of St. Louis in the State of Missouri.

135 In the Supreme Court of the State of Missouri.

No. 20171.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, Plaintiff in Error,

vs.

THE STATE OF MISSOURI at the Relation and to the Use of JAS. HAGERMAN, JR., Collector of the City of St. Louis, in the State of Missouri, Defendant in Error.

Praecipe for Transcript.

The Clerk will please incorporate in the transcript copies of all the proceedings in this Court which constitute the record of this Court together with a copy of the entire original record or transcript from the Court below; the opinions of the trial Court Judge Kinsey as set forth in respondent's brief page- 11 to 20 both inclusive; a copy of the opinions of this Court; and a copy of the Motion for Rehearing; and a copy of the Motion to transfer to the Court in Banc, all orders and proceedings of this Court.

DAWSON & GARVIN AND
WILLIAM E. GARVIN,
Attorneys for St. Louis & East St. Louis Electric Railway Co.

Service of the within and foregoing is hereby acknowledged this 31st day of January 1920.

THOMAS G. RUTLEDGE AND
J. M. LASHLY,
Attorneys for The State of Missouri at the Relation and to the Use of Jas. Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri.

136 STATE OF MISSOURI, *ss.*:

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause of The State of Missouri, at the relation and to the use of James Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri, Respondent, vs. St. Louis & East St. Louis Electric Railway Company, a Corporation, Appellant, No. 20,171, as the same appear of record and on file in my office, and as called for in the within praecipe.

In testimony whereof, I have hereunto set my hand and attached the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 6th day of February, 1920.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 27,506. Missouri Supreme Court. Term No. 751. The St. Louis & East St. Louis Electric Railway Company, plaintiff in error, vs. The State of Missouri at the relation and to the use of James Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri. Filed February 28th, 1920. File No. 27,506.

Supreme Court of the United States.

No. 261, October Term, 1920.

THE ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, Plaintiff-in-Error,

vs.

THE STATE OF MISSOURI, at the Relation and to the Use of James Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri, Defendant-in-Error.

Stipulation & Addition to Record.

It is stipulated and agreed between the parties in the above entitled case that the contract or agreement between Terminal Railroad Association of St. Louis and The St. Louis & East St. Louis Electric Railway Company, The East St. Louis Electric Street Railroad Company and The East St. Louis & Suburban Railway Company, dated April 11, 1902, a copy of which is attached hereto marked "Exhibit A." which contract or agreement is referred to in Item 8 of the agreed statement of facts Transcript of Record page 16 as being attached as an appendix, but which does not appear in the Transcript of Record, shall be added to the record in the above entitled case.

JOSEPH S. CLARK,
WILLIAM E. GARVIN,
Attorneys for Plaintiff-in-error.
THOMAS T. RUTLEDGE,
J. M. LASHLY,
Attorneys for Defendant-in-error.

Feb. 3rd, 1921.

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EXHIBIT A.

Agreement Between Terminal Railroad Association of St. Louis and The St. Louis and East St. Louis Electric Railway Company, The East St. Louis Electric Street Railroad Company, and The East St. Louis and Suburban Railway Company.

April 11th, 1902.

An agreement entered into this eleventh day of April, A. D. 1902, by and between the Terminal Railroad Association of St. Louis, a corporation organized and existing under the laws of the State of Missouri, party of the first part, hereinafter designated "Terminal Company;" The St. Louis and East St. Louis Electric Railway Company, a corporation likewise organized and existing under the laws

of the State of Missouri, party of the second part, hereinafter designated "Bridge Electric Company;" The East St. Louis Electric Street Railroad Company, a corporation organized and existing under the laws of the State of Illinois, party of the third part, hereinafter designated "East St. Louis Company;" and The East St. Louis and Suburban Railway Company, a corporation organized and existing under the laws of the State of Illinois, party of the fourth part, hereinafter designated "Suburban Company," Witnesseth:

Whereas, Said Terminal Company is the lessee of the railway bridge known as the Eads Bridge, crossing the Mississippi River at the City of St. Louis, Missouri, and connecting said City of St. Louis and the City of East St. Louis, Illinois, and as such lessee is interested in having all street car passenger traffic destined to cross said river between any points in either of said cities pass over said bridge—the securing of such traffic being one of the inducements and part consideration moving said Terminal Company to enter into this agreement; and

Whereas, Under date of July 26, A. D. 1889, a certain contract was entered into by and between the St. Louis Bridge Company and the Missouri Pacific Railway Company and the Wabash, St. Louis and Pacific Railway Company, lessees thereof, of the one part, and said Bridge Electric Company, whereby said Bridge Electric Company was granted the right to operate a street railway electric line over said bridge for the term and upon the conditions in said agreement set forth, which said contract said Terminal Company and said Bridge Electric Company have agreed and do hereby agree shall be cancelled and determined as of this date, and thereafter for naught held, and in substitution therefor the agreement between said parties as herein expressed entered into; and

Whereas, Said Suburban Company is operating a number of electric railway lines in the Counties of St. Clair and Madison, in the State of Illinois, and converging at the City of East St. Louis in said State, and connecting with the street railway line of said East St. Louis Company; and

Whereas, Said East St. Louis Company is now operating an electric street railway line in said City of East St. Louis, which it proposes from time to time to extend; and

Whereas, Said Suburban Company contemplates the acquisition of new and additional electric railway lines and the extension of its present lines; and

Whereas, It is the intention of each and every of the parties hereto and the purpose in executing this agreement to hereby cause, during the life of this contract, all passenger traffic originating on any of the lines of said Suburban and East St. Louis Companies, and on any electric railway lines hereafter owned, operated or controlled by them, or either of them, destined to cross the Mississippi River between the Cities of St. Louis and East St. Louis, and originating in the City of St. Louis and destined to cross said river, between said cities, to any point on any of the lines of said East St. Louis and Suburban Companies, or to any point on any electric railway line hereafter owned, operated, or controlled by them, or either of them, to pass over said bridge; and

Whereas, It is the desire of the Terminal Company, and one of the considerations inducing it to enter into this agreement, that through cars may be operated, in continuous runs and without change of cars, over said bridge and over the line of said East St. Louis Company, and by transfer to all points on the line of said last named company and the lines of said Suburban Company, as well as to all points on electric railway lines that may be hereafter at any time owned, operated, or controlled by either of said companies; and

Whereas, It is the desire and purpose of said Bridge Electric Company and of said East St. Louis Company that such arrangements shall be entered into between them whereby through cars may be operated in continuous runs and without change over their respective lines, the making of such arrangements being a consideration inducing said last named companies to enter into this agreement;

Now Therefore, It is agreed by and between the parties hereto, said parties of the second, third and fourth parts covenanting and agreeing each with the other, and all covenanting and agreeing to and with said party of the first part, as follows, to wit:

I. Said contract hereinabove referred to, dated the twenty-sixth day of July, A. D. 1889, by and between the St. Louis Bridge Company and the Missouri Pacific Railway Company and Wabash, St. Louis and Pacific Railway Company, lessees thereof, and said St. Louis and East St. Louis Electric Railway Company (herein designated Bridge Electric Company), is hereby cancelled, determined, and for naught held; and in substitution therefor it is agreed by and between said Terminal Company and said Bridge Electric Company as follows, to wit:

(A) Said Terminal Company hereby grants to said Bridge Electric Company the exclusive franchise, right, and privilege, so far as said Terminal Company legally may, to operate, for passenger traffic only, an electric street car line over the upper roadway, and extensions thereof and approaches thereto, of said bridge during the life of this contract.

(B) Said Terminal Company, if the present tracks are not of the proper design or of sufficient weight for the operation over said upper roadway, approaches, and extensions, of the street cars to be operated as herein provided, will, at its own cost and expense, reconstruct said tracks with rails of the proper design and of sufficient weight.

(C) Said Terminal Company will, if in its judgment desirable and necessary, at its own expense, improve, widen, and strengthen the east approach to the upper roadway of said bridge, in order to facilitate the operation of street cars thereover and allow the use of heavier cars; and until such improvement is made the compensation to be paid to said Terminal Company shall be forty (40) per cent of the entire gross proceeds derived from the operation of street cars over said upper roadway, in lieu of one-half of such proceeds as provided in subdivision "F" hereof; the fares, however, to be charged for the carriage of passengers in the cars to be operated as herein provided shall be not less than five (5) cents nor more than ten (10)

cents per passenger, said Terminal Company having the right at all times to determine the rates between said amounts.

(D) Said Terminal Company shall and will, at its own expense, at all times maintain in proper condition said tracks, the roadway between the same, and the supports thereof, but shall be at no other cost or expense whatsoever in connection with the construction, maintenance, or operation of said railway.

(E) Said Bridge Electric Company shall and will at all times, at its own cost and expense, furnish and maintain all such poles, wires, dynamos, motors, devices, and appliances, labor, servants and employes, and motive power, and operate such cars, as may be necessary for the safe and proper conduct and operation of the street railway line over said bridge,—the franchise, right, and privilege to operate which are herein granted; and all cars operated over said upper roadway of said bridge shall be subject to the approval of the General Manager of said Terminal Company.

(F) Subject to the conditions of subdivision "C" above hereof, the entire gross proceeds derived from the operation of street railway cars as herein contemplated, over said upper roadway of said bridge, shall be equally divided, and one-half thereof paid to said Terminal Company and the remaining half retained by said Bridge Electric Company. Fares to be charged for the carriage of passengers in said cars shall be not less than five (5) cents nor more than ten (10) cents per passenger—said Terminal Company having the right at all times to determine the rates between said amounts.

(G) Said Bridge Electric Company shall and will at all times furnish all such cars as in the judgment of the General Manager of said Terminal Company may be necessary to accommodate the street car travel over said bridge, and shall and will run said cars at such intervals as may be determined by said General Manager; it being expressly understood, however, that the rights herein reserved to the General Manager of said Terminal Company, to determine number of cars and the frequency with which the same shall be operated, shall be exercised only in the interest of the traffic using said street railway line, and shall not be arbitrarily exercised for the purpose of making this contract onerous or burdensome to said Bridge Electric Company.

(H) Passes or free transportation shall be furnished to such officers, and also to employes of said Terminal Company, when travelling on the business of said company, as request therefor may be made by the General Manager of said Terminal Company. Passes or free transportation may be furnished to the officers and also to employes of said Bridge Electric Company, when travelling on the business of said company. No passes or free transportation, except as just stated, shall be furnished without the mutual agreement of the General Managers of said Terminal Company and said Bridge Electric Company.

(I) Said Bridge Electric Company shall render to said Terminal Company a daily statement of the number of tickets sold and cash fares collected, which statement shall embody duplicates of the daily and trip reports made said Bridge Electric Company by its employes and agents; and on the tenth day of each month said Bridge Electric Company shall pay to said Terminal Company the total amount due it on all tickets sold and cash fares collected during the preceding month; and the books of said Bridge Electric Company shall at all times be subject to the inspection of the representatives of said Terminal Company for the purpose of verifying the statements submitted by said Bridge Electric Company. All cars operated over said upper roadway shall at all times be provided with fare registers or other devices or apparatus satisfactory to said Terminal Company, upon which the employes of said Bridge Electric Company shall correctly register all fares as and when received, showing the number of fares received; and said Terminal Company shall have the right to inspect all such registers and other devices and to keep an account of all fares received; and the books of said Bridge Electric Company, showing all such fares and all passengers carried, shall at all times be open to the inspection and examination of said Terminal Company and its duly authorized agents and employes. And said Bridge Electric Company hereby covenants and agrees that it will, as and whenever so requested by said Terminal Company, furnish said Terminal Company all information, of every nature and kind, necessary or proper to enable said Terminal Company to ascertain the actual number of passengers so carried, together with all the facts and information which may be necessary or convenient to properly carry out the terms of this contract, to the end that said Terminal Company shall receive the amount of compensation so agreed to be paid to it herein. And said Terminal Company shall at all times have the right to place inspectors upon cars while operated, as herein provided, over said upper roadway, approaches, and extensions thereof, thereby securing correct account of fares received and passengers carried. And in the event said Bridge Electric Company shall at any time be in default for a period of thirty (30) days in the payment to said Terminal Company of any amount or sum due or payable under this contract, said Terminal Company may place collectors on all cars operated hereunder, who may collect all fares until all amounts so due have been fully paid; and said Terminal Company shall have the right to receive and retain all such fares; and such right to collect and retain all such fares shall continue in force and may be exercised from time to time whenever said Bridge Electric Company shall be in such default.

(J) Said Bridge Electric Company shall at all times have the right to appeal from any ruling or decision of the General Manager of said Terminal Company to the Board of Directors of said Terminal Company, and the decision of said Board shall be final and conclusive and binding upon said Bridge Electric Company.

(K) Said Bridge Electric Company shall and will at all times fully indemnify and save and hold harmless said Terminal Company

from any and all liability for loss, damage, or injury to persons or property caused by defective equipment or by the carelessness, negligence, or wrongful acts of any employe, servant, agent, or officer of said Bridge Electric Company; it being hereby stipulated and agreed that all such employes, servants, agents, and officers of said Bridge Electric Company are not to be deemed or held, in any manner, at any time, in any event, or in any respect, to be the employes, servants, agents, or officers of said Terminal Company. And said Bridge Electric Company further agrees, at its sole cost and expense, and upon notice from said Terminal Company, to defend any and all suits against said Terminal Company for any such damages aforesaid, and to pay any and all judgments which may be rendered against said Terminal Company in such suits, together with all costs of court therein, which said Terminal Company may be adjudged to pay.

(L) Said Terminal Company shall and will at all times fully indemnify, protect and save harmless said Bridge Electric Company from all liability due to any defect in the rails, the roadway between the same, or the supports thereof, which said Terminal Company is required to maintain under the provisions hereof; provided, however, that the liability of said Terminal Company to so fully indemnify, protect, and save harmless said Bridge Electric Company shall arise only in the event that said Terminal Company shall fail within reasonable time to repair such defect after having knowledge thereof. In the event said Terminal Company should fail within reasonable time to repair such defect after having knowledge thereof, then, for all loss, damage, or injury to said Bridge Electric Company resulting therefrom, said Terminal Company shall and will indemnify, protect, and save harmless said Bridge Electric Company, and said Terminal Company will in such event, at its sole cost and expense, and upon notice from said Bridge Electric Company, defend any and all suits against said Bridge Electric Company for damages so resulting, and will pay any and all judgments which may be rendered against said Bridge Electric Company in such suits, to-ge-her with all costs of court therein which said Bridge Electric Company may be adjudged to pay.

(M) Any failure on the part of said Bridge Electric Company to pay to said Terminal Company any amount due said Terminal Company within thirty (30) days after the same shall become due and payable as herein provided, shall entitle said Terminal Company to declare this agreement cancelled and terminated; and for each and every day that said Bridge Electric Company shall be in default in the payment of any amount due to said Terminal Company as herein provided, said Bridge Electric Company shall pay to said Terminal Company interest thereon at the rate of eight (8) per cent per annum; but such obligation to pay interest, and the right of said Terminal Company to collect the same, shall not exclude the rights of said Terminal Company herein granted, in subdivision "I" hereof, to collect fares when said Bridge Electric Company may be in default. Any failure upon the part of said Bridge Electric Company

to perform any one of the other covenants or agreements herein upon it imposed or by it assumed, if not corrected within sixty (60) days after notice in writing given to it by said Terminal Company, shall entitle said Terminal Company to declare this agreement cancelled and terminated.

(N) Said Terminal Company shall not at any time give more favorable privileges to any omnibus line, automobile line, or other transportation line, by whomsoever operated, for passenger travel over said upper roadway of said bridge, than are herein or may be hereafter granted to said Bridge Electric Company, or agree with any such line for such travel at a lower rate of fare than herein provided; this provision, however, shall not apply to the contract between said Terminal Company and the Interstate Transit Company, entered into as of the third day of January, 1902; but such contract shall not be renewed or extended.

II. Said parties of the second, third, and fourth parts hereby covenant and agree, each with the other and with said Terminal Company, that the railway lines of said parties of the second, third and fourth parts shall at all times be so operated as to direct all travel originating at or destined to any point on any line of any one of said parties of the second, third or fourth part, or on any electric railway line now or at any time hereafter operated, owned, or controlled jointly or by any one of said parties of the second, third and fourth parts and destined to cross the Mississippi River at any point between the City of St. Louis, Missouri and the City of East St. Louis, Illinois, to said bridge, to the end that all such street or car passenger traffic may and shall pass over said bridge; it being hereby stipulated and agreed that the securing of such street car passenger traffic over said bridge is one of the considerations moving and inducing said Terminal Company to enter into this agreement; and to this end and for this purpose said parties of the second, third and fourth parts hereby covenant and agree, each to and with the other, and each with said Terminal Company, that all cars operated over any electric railway line now or hereafter owned, operated, or controlled by said parties of the second, third or fourth part shall and will be so operated, and connections between such railway lines shall be so made and maintained, that all passenger traffic originating at or destined to any point on any electric railway line now or at any time hereafter owned, operated, or controlled by any one of said parties of the second, third or fourth parts and destined to pass by way of said East St. Louis to or from the said City of St. Louis, shall and will be solely and exclusively directed to the said bridge.

III. Said parties of the second and third parts hereby covenant and agree to and with each other, and with said Terminal Company, that through cars shall be operated in continuous runs and without change over the street railway lines of said parties of the second and third parts, with such frequency as may be determined by the General Manager of said Terminal Company, to the end that street car passenger traffic may pass without change of cars over the upper

roadway of said bridge and over the line of said East St. Louis Company, and by transfer to all points on the line of said last named Company; but the right of said General Manager to determine the frequency with which said through cars shall be operated shall be exercised only in the interest of the traffic using said railway line, and shall not be arbitrarily exercised for the purpose of making this contract onerous or burdensome to said parties of the second and third parts; and said parties of the second and third parts, and each of them, shall have the right at all times to appeal from any ruling or decision of the General Manager of said Terminal Company, with respect to the operation of such through cars to the Board of Directors of said Terminal Company, and the decision of said Board shall be final and conclusive, and binding upon said parties of the second and third parts, and each of them. All through cars shall be subject to the approval of said Terminal Company.

IV. In consideration of the benefits accruing to said parties of the second, third and fourth parts from the execution of this agreement in enabling them to provide for the movement of through cars without change over their respective lines and over the upper roadway of said bridge, and of the other benefits resulting to them herefrom, said parties of the second, third and fourth parts, and each of them, hereby further covenant and agree, to and with said Terminal Company that they, said parties of the second, third and fourth parts, or any one of them, will not at any time hereafter enter into any agreement, contract or understanding with any company, corporation, person, or persons owning, controlling, leasing or operating any other bridge crossing said Mississippi River at any point between said cities of St. Louis and East St. Louis, now or at any time hereafter constructed, whereby street car traffic of any character, originating on any line of any of said parties of the second, third and fourth parts, shall be permitted to pass over any such bridge or bridges, now or at any time hereafter constructed.

V. Said parties of the second, third and fourth parts hereby covenant and agree, each with the other and with said Terminal Company, that if at any time hereafter, and so often as other electric railway lines shall be constructed which shall connect with any one of the railway lines now or at any time hereafter operated, owned, or controlled by any one of said parties of the second, third, and fourth parts, an (and) arrangement shall and will be made between said parties of the second, third and fourth parts and such new line, if such new line shall desire such arrangement made, whereby traffic originating on or destined to any point on said new line, and destined to or from said City of St. Louis by way of East St. Louis, shall pass over said upper roadway of said bridge.

VI. In consideration of the premises, said Terminal Company hereby covenants and agrees to and with said parties of the second, third and fourth parts, and each of them, that it will not at any time hereafter become in any manner interested in any street railway line in the City of East St. Louis or in the territory adjacent or tributary thereto.

VII. Nothing in this agreement contained shall be so construed as in any manner to prevent said Terminal Company at any time hereafter from changing the motive power which may be used for the operation of cars or locomotives over any railroad line, now or at any time hereafter owned, used, operated, or controlled by it, to electricity, compressed air, or any other motive power whatsoever.

VIII. Nothing herein contained shall prevent a merger or consolidation by and between said parties of the second, third and fourth parts, or any two of them, or the consolidation of any one or more of them with any other electric railway line, or the consolidation or merger of said Terminal Company with any other railroad company; but in the event of any such consolidation or merger, and so often as such consolidations or mergers may be effected, each and every consolidated company shall be bound by the provisions hereof with like force and effect as if it had become a party hereto on the day of the date hereof.

IX. It is hereby expressly understood and agreed that this contract, while embodying covenants and agreements between the parties of the second, third and fourth parts as between themselves, and covenants and agreements between the parties of the second, third and fourth parts and said Terminal Company, shall be construed as one agreement and as an entirety, in so far as the right of said Terminal Company to declare same terminated and cancelled is concerned, for failure upon the part of any one of the parties of the second, third or fourth part to faithfully perform or discharge any covenant or obligation herein by it assumed or upon it imposed. And it is hereby expressly stipulated and agreed that if at any time any one of said parties of the second, third, or fourth parts shall fail, refuse, or be for any cause unable to perform or discharge, or prevented from performing or discharging, any covenant or obligation by it assumed, or herein upon it imposed, either as between themselves, or as between themselves or any one of them and said Terminal Company, then and in such event said Terminal Company may declare this agreement terminated, and thereupon the right, privilege, and franchise herein granted to operate a street railway line over the upper roadway of said bridge shall immediately cease and determine; provided the party so in default shall not within sixty (60) days after notice given to it by said Terminal Company of such default, and of its intention to declare this agreement terminated by reason thereof, correct such default by entering upon and continuing the performance of such covenant or obligation.

X. Nothing herein contained shall be construed or understood as a warranty on the part of said Terminal Company that said bridge shall or will continue a safe structure for public use during the term of this agreement, or impose upon the Terminal Company the obligation to rebuild said bridge in case it shall be destroyed by the elements or rendered dangerous and unsafe from any other cause; and it is expressly agreed that said Terminal Company shall not be liable in damages to the other parties hereto, or either of them, for

any interruption of their business or traffic over the upper roadway of said bridge (as herein granted and provided for), when such interruption of business or traffic shall be occasioned by the destruction or injury of said bridge from any cause, or by damage or injury thereto from any cause which may render the same unsafe, or when such interruption shall be occasioned by the making of any necessary repairs or improvements to said bridge, or said upper roadway, or said tracks, the roadway between the same, or the supports thereof.

XI. The provisions hereof shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto.

XII. This agreement shall continue in full force and effect for the term of fifty (50) years from the day of the date hereof, unless sooner terminated by said Terminal Company as hereinabove provided.

In Witness Whereof, Said parties hereto have caused this agreement to be executed in four parts by their respective officers, and their respective corporate seals to be hereunto attached, as of the day and year first hereinabove written.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

[SEAL.] By JULIUS S. WALSH,
President.

Attest:
H. D. HUNT,
Secretary pro Tem.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY CO.,

[SEAL.] By L. C. HAYNES,
President.

Attest:
EDWARDS WHITAKER,
Secretary.

EAST ST. LOUIS ELECTRIC STREET RAILROAD COMPANY,

[SEAL.] By E. W. CLARK, JR.,
Pres't.

Attest:
EDW. ABEND, JR.,
Secretary.

EAST ST. LOUIS AND SUBURBAN RAILWAY COMPANY,

[SEAL.] By GEORGE J. KOBUSCH,
Pres't.

Attest:
EDW. ABEND, JR.,
Secretary.

STATE OF MISSOURI,
City of St. Louis, ss:

On this eleventh day of April, 1902, before me appeared Julius S. Walsh, to me personally known, who, being by me duly sworn, did say that he is the President of the Terminal Railroad Association of St. Louis, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Julius S. Walsh acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have set my hand and official seal, at my office, in said City of St. Louis, the date and year in this certificate first above written.

My term as notary expires October 15, 1903.

[SEAL.] MARK EWING,
Notary Public, City of St. Louis, Mo.

STATE OF MISSOURI,
City of St. Louis, ss:

On this eleventh day of April, 1902, before me appeared L. C. Haynes, to me personally known, who, being by me duly sworn, did say that he is the President of the St. Louis and East St. Louis Electric Railway, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said L. C. Haynes acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have set my hand and official seal, at my office, in said City of St. Louis, the date and year in this certificate first above written.

My term expires August 24, 1905.

[SEAL.] CHAPMAN S. CHARLOT,
Notary Public, City of St. Louis, Mo.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Mark Ewing, a Notary Public, in and for said City of St. Louis, in the State aforesaid, do hereby certify that E. W. Clark, Jr., personally known to me and personally known to me to be the President of the East St. Louis Electric Street Railroad Company and Edward Abend, Jr., personally known to me and personally known to me to be the Secretary of said company, whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such President and Secretary, they signed and delivered the said instrument of writing as President and Secretary of said company, and caused the corporate seal of said company to be affixed thereto, pursuant to authority given by the Board of Directors of said company as their free and voluntary act, and as the free and voluntary act and deed of said company, for the uses and purposes therein set forth.

Given under my hand and notarial seal this eleventh day of April, A. D. 1902.

My term as notary expires October 15, 1903.

[SEAL.] MARK EWING,
Notary Public.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Chapman S. Charlot, a Notary Public, in and for said City of St. Louis, in the State aforesaid, do hereby certify that George J. Kobusch, personally known to me and personally known to me to be the President of the East St. Louis and Suburban Railway Company and Edward Abend, Jr., personally known to me and personally known to me to be the Secretary of said company, whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such President and Secretary, they signed and delivered the said instrument of writing as President and Secretary of said company, and caused the corporate seal of said company to be affixed thereto, pursuant to authority given by the Board of Directors of said company as their free and voluntary act and as the free and voluntary act and deed of said company, for the uses and purposes therein set forth.

Given under my hand and notarial seal this eleventh day of April, A. D. 1902.

My term as Notary expires August 24, 1905.

[SEAL.] CHAPMAN S. CHARLOT,
Notary Public.

[Endorsed:] 261—27506. Oct. Term, 1920. No. 261. U. S. S. C. The St. Louis and East St. Louis Electric Railway Co., plaintiff in error, vs. The State of Missouri ex rel. Hagerman, collector, &c., defendant in error. Stipulation as to Addition to Record.

[Endorsed:] File No. 27,506. Supreme Court U. S., October Term, 1920. Term No. 261. The St. Louis & East St. Louis Electric Ry. Co., plff. in error, vs. The State of Missouri ex rel. Hagerman, collector, etc. Stipulation and Addition to Record. Filed Feb. 14, 1921.

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TABLE OF CASES.

TABLE OF STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920. NO. 261.

The St. Louis & East St. Louis Electric Railway Company, Plaintiff in Error,

vs.

The State of Missouri at the Relation and to the use of James Hagerman, Jr., Collector of the City of St. Louis, in the State of Missouri.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

This is a suit by the State of Missouri on the relation of James Hagerman, Jr., Collector of the City of St. Louis (hereinafter called "Tax Collector"), to recover taxes for the year 1907 assessed by the State Board of Equalization of the State of Missouri against the property of the plaintiff-in-error (hereinafter called the "Railway Company"), under the provisions of the Missouri Statutes. The case was tried in the Circuit Court of the City of St. Louis under

an Agreed Statement of Facts, which appears in the Record at pages 15 to 35, inclusive. This Statement of Facts relates to two cases, the one now before this court, and another one instituted by the Tax Collector for the collection of taxes for the year 1899. This second case has been disposed of and is not before this court under the present writ of error. In the present case the Circuit Court of the City of St. Louis rendered judgment against the Railway Company in favor of the Tax Collector for the sum of $9356.19. The Railway Company appealed to the Supreme Court of Missouri, which affirmed this judgment. The case comes to this court by writ of error from the Supreme Court of Missouri.

STATEMENT OF THE CASE.

The Railway Company, plaintiff in error, was incorporated in the year 1889 as a railroad company under the provisions of Article II of Chapter 21 of the Revised Statutes of Missouri of 1879, with western terminus in Missouri and eastern terminus in Illinois (Agreed Statement of Facts, Paragraph 1, Record, p. 15). The St. Louis Bridge Company was previously organized under the Missouri and Illinois laws and had erected under authority of an Act of Congress a toll bridge known as the "Eads Bridge," which extended over the Mississippi River, from the City of St. Louis, Missouri, to the City of East St. Louis, Illinois (Agreed Statement, Paragraph 3, Record, p. 15). On July 26, 1889, the Railway Company entered into a written contract with the St. Louis Bridge Company and the Missouri Pacific Railway Company and the Wabash, St. Louis & Pacific Railway Company (the two railroad companies having leased the bridge from the Bridge Company), by which the Railway Company was permitted to operate electric trolley cars over the upper or foot and wagon roadway of the bridge and agreed to pay to the Bridge Company a certain percentage of the fares received (Agreed

Statement, Paragraph 5, Record, p. 15). In April, 1902, this contract was cancelled and a new contract, dated April 11, 1902, was entered into with the Terminal Railroad Association of St. Louis, which had acquired by assignment the lease of the bridge from the above lessees. The new agreement authorized the Railway Company to operate electric cars on the upper roadway of the bridge for a period of fifty years. The East St. Louis Electric Street Railroad Company and the East St. Louis & Suburban Railway Company, both Illinois corporations, were made parties for the purpose of procuring street car passenger traffic across the bridge (Agreed Statement, Paragraph 8, Record, p. 16).

The bridge and approaches are something over a mile in length. The actual total measured length of the trolley car tracks, all of which are located on the bridge, is .865 of a mile of which .346 of a mile is in the State of Missouri and the balance is in the State of Illinois (Agreed Statement, Paragraph 7, Record, p. 16).

The Railway Company's business is confined to carrying passengers from the State of Illinois to the State of Missouri and vice versa, and the Company does not receive passengers at any point in Missouri and discharge them at any other point in said State. All of the business of the Railway Company is interstate business.

The State Board of Equalization of the State of Missouri found the value of the property of the Railway Company for purposes of taxation for the year 1907, as follows:

Value per mile of rolling stock....	$32,629.5375
Value per mile of roadbed and superstructure, ...	5,000.00
Value per mile of "all other property".....	500,000.4625
Total distributable value per mile	537,630.00
Mileage in Missouri.....	.346

Of the total valuation so found, there was apportioned to the State of Missouri $186,019.98, of which $173,000.16

was included under the item of "all other property;" and the balance, to-wit, $13,019.82, was made up of the value of rolling stock (including cash) and road-bed and superstructure. This balance includes $346/865ths of the cash in bank which, as shown on page 24 of the record, amounted to $26,524.55, and 346/865ths of this amount is $10,609.82. The result of these figures is that the only tangible property of the Railway Company located in Missouri, outside of its cash in bank, was valued at $2410, but the property in the state including both tangible and intangible was assessed for taxation purposes at $186,019.98. (Agreed Statement, Paragraphs 17 and 18, Record, pp. 19-30.)

SPECIFICATION OF ERRORS.

The assignments of error will be found at pages 77 to 81 of the Record. Those specifically relied upon are the 1st, 2d, 3d, 6th, 10th and 11th, which are as follows:

1.

"That the Supreme Court of the State of Missouri erred in refusing to grant defendant's (here plaintiff in error) appeal and reverse the judgment of the trial court on the Federal questions involved and in overruling on, to-wit, December 1st, 1919, appellant's motions for a rehearing and to transfer this case to Court in banc.

2.

"That the said Court erred in holding that R. S. Mo. 1899, §§9338-9344, 9353-9378, Laws of Missouri 1901, page 232, and Laws of Missouri 1905, page 269, all of which are now included in Sections 11551-11597, R. S. Mo. 1909 (being Articles XI and XII of Chapter 117, entitled 'Taxation of Franchises' and 'Taxation of Railroads, Railroad Cars and Street Car Companies,' respectively), as applied and construed by the State Board of Equalization and the

trial Court were constituional and did not impose a direct burden upon interstate commerce in violation of Section 8 of Article One of the Constitution of the United States, and did not amount to a taking of petitioner's property without due process of iaw in violation of the Fourteenth Amendment to the Constitution of the United States, in that the said tax was assessed against property used solely in the transaction of interstate commerce, said property being situated entirely on an interstate toll bridge known as the Eads Bridge between St. Louis, Missouri and East St. Louis, Illinois, and was levied against a corporation engaged exclusively in interstate business, all of which said facts appear in the agreed statement of facts.

3.

"That the said Court erred in holding that the Laws of Missouri 1901, page 232, all of which are now included in Sections 11551-11552, R. S. Mo. 1909 (being Article XI of Chapter 117 entitled 'Taxation of Franchises') as applied and construed by the State Board of Equalization and the trial Court were constitutional and did not impose a direct burden upon interstate commerce contrary to Section 8 of Article One of the Constitution of the United States, and did not take defendant's (here plaintiff in error) property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States, the assessment of 'all other property' provided for in said statutes and on which the tax sought to be collected was chiefly based having been arrived at by valuing in the manner set forth in the agreed statement of facts the only intangible property owned by defendant, to-wit, its privilege of doing an exclusively interstate business.

6.

"That the said Court erred in upholding the tax assessed by the State of Missouri as not constituting

a burden on interstate commerce and not depriving defendant (here plaintiff in error) of its property without due process of law, in conflict with Section 8 of Article One and the Fourteenth Amendment to the Constitution of the United States, in view of the facts and circumstances under which said tax was assessed, all as set forth in defendant's (here plaintiff in error) answer and established by the agreed statement of facts under which the case was tried.

10.

"That the said Court erred in overruling appellant's (here plaintiff in error) Fourteenth Assignment of Error as follows:

'In not finding that the attempted assessment and taxation in the case is a direct burden upon and interference with interstate commerce and in violation of the Federal Constitution and laws and therefore void.'

11.

"That the said Court erred in overruling appellant's (here plaintiff in error) Fifteenth Assignment of Error, in so far as such assignment presents a Federal question, as follows:

'In not finding that the attempted assessment and taxation in the case is, at least in part, beyond the jurisdiction of the State of Missouri to tax and is in violation of the Constitution and laws of Missouri and also is in violation of Federal laws and the Fourteenth Amendment of the Federal Constitution prohibiting the State from taking property without due process of law.'"

ARGUMENT.

The pertinent sections of the taxation statutes of Missouri under which this tax was levied are printed in the Appendix to this brief (pp. 41-44) excepting only Sections 1 and 2, Laws of Missouri 1901, p. 232 (R. S. Mo. 1909, §§ 11551-11552), which are as follows:

> "SEC. 11551. *To be Assessed How—Tax Due and Payable When.* The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities and of all quasi public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation (Laws 1901, page 232)."
>
> "SEC. 11552. *Valuations, How Fixed and By Whom.* The state board of equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations whose property the state board of equalization is now or may hereafter be required to assess, and the county assessor, in case of the other quasi public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intan-

> gible, in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, under the head of 'all other property' (Laws 1901, page 232)."

These two sections and the sections printed in the Appendix show the system of taxation of railroad, telegraph and other similar companies adopted by the State of Missouri. A similar method has been adopted by the State of Kentucky and by a number of other states. The tax levied is a property tax, and the method prescribed is to value for taxation all of the property within the state, both tangible and intangible, then deduct the value of the tangible property and assess the remainder of the valuation as "all other property," which is construed to mean the intangible property of the company.

In the present case the tax collector valued the tangible property at the rate of $37,620.5375 per mile and fixed the value per mile of "all other property" at $500,000.4625, making the value per mile of the tangible and intangible property $537,630. The total mileage of the line in Missouri and Illinois was .805 of a mile, and the length in Missouri was .346 of a mile. The tax collector took .346 of the above mentioned total value, to-wit, $537,630 and assessed the value of the property in Missouri at $186,019.98, of which $173,000.16 represented the valuation of "all other property."

The valuation was based upon the capital stock and the earnings of the Company. Judge Kinsey said in his opinion in the Circuit Court (Record, p. 54):—

> "In 1900 defendant had a bonded debt of $75,000 upon which it paid interest at the rate of 6%, and a capital stock of $250,000 upon which it paid a dividend for that year of 23.75%. In 1906 it had a bonded debt of $500,000 upon which it paid interest at the rate of 5%, and capital stock of $500,000 upon which

it paid dividends aggregating 17% for the years 1902 to 1907, both inclusive, or an average dividend of about 2.75%. The capital stock of the defendant represents the value of both its tangible and intangible property. As said by the Supreme Court of the United States in one of the cases cited in plaintiff's brief, the value of property is not to be measured by what it costs but rather by what it will produce in the way of income. Its value for the purpose of assessment and taxation is not affected by the fact that it is mortgaged to the extent of $500,000. In effect the defendant's property produced an income of about 7½% on a valuation of $500,000 in 1906. The State Board valued the defendant's tangible property at the rate of $37,629.53 per mile, and its intangible property at the rate of $500,000 per mile, or the whole of it at the rate of $537,629.53 per mile. Reducing this total valuation per mile to the mileage of defendant's road, to-wit, .865 of a mile, gives $465,029.54 as the assessed value of the defendant's property for taxation. It is obvious that this assessment is based upon the value of the defendant's property as expressed by its capital stock, and the earning power of that stock. Of the total assessed value, $180,019.98 is apportioned to the State of Missouri upon a mileage basis as representing the value of its property in this State for taxation. Of this last named sum $173,000.16 is classified in accordance with the statute as 'all other property' and is evidently intended to represent the value of the defendant's intangible property in this State."

We are not left in doubt in the present case in regard to the items which make up this intangible property valued at $173,000.16. The Agreed Statement of Facts shews that the intangible property consists of two items *only*, (1) the charter franchise of the Railway Company authorizing it to transact its business, all of which is interstate, and (2) its franchise from the bridge highway authorities rep-

resented by the bridge contract, which authorizes it to transact its interstate business on the bridge structure. The franchise to be is exempt from taxation under this statute (Sec. 11551). The Supreme Court of Missouri understood that these two franchises constituted all of the intangible property taxed as "all other property." The opinion reads as follows (Record, p. 64):—

> "Under the agreed statement of facts appellant owned a usufruct in about one-third of a mile of railroad track on that portion of the bridge within the limits of Missouri. It also owned, as stated before, the rails, the superstructure and wires which enabled it to operate its trolley cars over this line. It also owned money on deposit in banks in Missouri; also the franchise of operating its railroad, granted to it by the legislature of the state, and consented to by the local authorities in charge of the bridge. All of this property was within the territory of this state and, therefore, its assessment for taxation did not impose a direct burden upon interstate commerce under the principles declared and the rule stated in the foregoing quotation from the opinion of the Supreme Court of the United States and the authorities therein cited."

Eliminating the tangible property shown by the above quotation there remains only as the intangible property, (1) the usufruct in that portion of the railway line on the bridge located within the limits of the State of Missouri, and (2) the charter franchise to operate the road. The opinion also says (Record, p. 62):—

> "In the case at bar the bridge as a bridge, embracing its multiform uses as such, was taxed against the owners thereof, but that assessment in no wise precluded the State Board of Equalization from making another assessment against the corporate grantee of a contract of user of a right of way for its electric trolley line over said bridge."

This bridge franchise was, of course, the valuable item of the Railway Company's intangible property. The other item, the charter franchise, could be secured for the asking by filing the necessary papers, as required by the incorporation statute.

The opinion in the Supreme Court also says, speaking of the company (Record, p. 63):—

> "It possesses, by the terms of its charter, the right to contract (*construct*) and operate a railroad. The bridge over which its track is laid is, in a general sense, a public highway. Under the Constitution of this state, its right to operate its street railway over the public highway (the bridge) could only be exercised by the consent of the local authorities having control of the highway proposed to be occupied by such street railway. (Const. Art. XII, sec. 20.) When it obtained this permission to operate its street railway on this public highway for fifty years, the legislative grant instantly became effective and vested in appellant a valuable franchise wholly distinct from its franchise of artificial entity (State *ex rel v.* Railroad, 140 Mo. 1, c. 549) and one which is specifically assessable for taxation under the terms of the statutes providing for taxation of franchises. (State *ex rel v.* Wiggins Ferry Co., 208 Mo. 622.) Proceeding under these statutes and in accordance with the method prescribed in a subsequent section (11559, R. S. 1909) the Board of Equalization assessed and adjusted the taxes laid on defendant's franchises on a mileage basis and after the hearing of evidence, and in so doing it arrived at the conclusion that the value of the intangible property of defendant in Missouri was $173,000.-00. It referred to this specific assessment as one made on 'all other property' of defendant, a method of distinguishing the various items approved in State *ex rel v.* Wiggins Ferry Co. (208 Mo. 622). In the present case, as has been seen, the franchise to operate

> a railroad resting primarily in legislative grant, became consummate when the consent to occupy the bridge for that purpose was obtained, for then it ripened into a legislative privilege and fell within the correct meaning of the term 'franchise,' which implies a privilege conferred by law to do that which 'does not belong to the citizens of the country generally as a common right.' (12 R. C. L. 173, sec. 1 *et seq.*; State *ex rel v.* Weatherby, 45 Mo. 1, c. 20.) According to the agreed facts this franchise vested in appellant, was a practical monopoly with a possible life of fifty years."

The Circuit Court of the City of St. Louis, in which this suit was instituted also considered the items of intangible property assessed as "all other property." In the first opinion filed in that court by Judge Kinsey, he said (Record, pp. 54 and 55):—

> "This easement or right of way was intangible property of great value, especially if it carried the exclusive right to use the tracks on the bridge. The defendant also owned at that time a franchise obtained from the State of Missouri to operate an electric street railway in this state, which was also intangible property."

The Act of Missouri describes the several kinds of companies which are subject to the tax, and among them, railroad and street railway companies. The class is quite broad enough to include the Railway Company in the present case. It does not follow that the property of the Railway Company, particularly its intangible property consisting only of its charter franchise and bridge franchise may be valued for taxation purposes according to the unit rule.

The rule has never been applied in a case like the present, where the Company taxed is a Railway Company operating only on a bridge which is an instrumentality of interstate commerce and the only property taxed consists of two franchises to transact interstate business and the only business transacted is interstate business (Agreed Statement, Paragraph 10, Record, p. 17).

I

The Unit Rule of Valuation.

There has been a great deal of litigation in the various states and many cases have reached this court involving state taxation of railway, telegraph and other similar companies under statutes of this kind. A state cannot tax property located outside of its limits, but in valuing the portion of the system located within its limits it may value the entire system and then value the proportion of the system within the state by comparing the mileage of the line in the state with the total mileage. In valuing the entire system particular consideration may be given to the earnings and the market value of bonds and stocks outstanding. This method of valuation for state taxation is sometimes called the unit rule. All of the property within the state, both tangible and intangible, is valued, including franchises, rights and privileges, good-will and business. The business of the company is the most important factor, for it is the business which produces the earnings and creates the market value of the securities.

Companies which were taxed according to this rule objected on the ground that they were engaged in interstate business and that the tax, although in form a tax upon their property, was in fact a tax upon their interstate business. This objection was overruled on the ground that the tax is a property tax and not a tax on their business, and that the burden upon their interstate business was an indirect burden only.

These companies also objected to taxation according to this method on the ground that it would result in taxation of property outside of the state and on that account violated the due process clause of the 14th Amendment. This objection was also overruled on the ground that this method of valuation provided a reasonable measure of value for that part of the system located within the state.

The telegraph companies also objected on the ground that included within the valuation of their properties ac-

cording to this method was the franchise granted by the Act of Congress of July 24, 1866, authorizing the construction and operation of telegraph lines on the post roads of the United States. This objection was also overruled on the ground that these so-called franchises under the Act of 1866 are permissive only and do not make the grantees the agents or instrumentalities of the Federal Government for the exercise of any powers or authority, as no such powers or authority are conferred.

These and other principles are now well settled and control the valuation for state taxation of the portions of the systems of railroad, telegraph and other similar companies located within the state levying the tax.

The opinion of the Supreme Court of Missouri in the present case reads as follows (Record, p. 64):—

> "It is not within the power of the states to put a direct burden on interstate commerce, the exclusive regulation of which is granted to Congress by the Constitution of the United States (U. S. Const. Art. I, sec. 8). But this provision does not prevent the assessment of property situated in the several states because it is a part of a unified system which is appropriated to interstate commerce. In such cases the property 'may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, (for) taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. (Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194; Adams Exp. Co. *v.* Kentucky, 166 U. S. 171; Fargo *v.* Hart, 193 U. S. 490.) So it has been held that a tax on property and business of a railroad operated within the state might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried

within the state to the total length of the road over which it was carried. (Wisconsin & M. R. Co. *v.* Powers, 191 U. S. 379.) Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern." (Galveston, etc. R. Co. *vs.* Texas, 210 U. S. 217, 227.)

It has been held that the franchise of a corporation, although the franchise is the business of interstate commerce, is subject to state taxation. In the case of *Atlantic & P. Telegraph Co.* vs. *Philadelphia*, 190 U. S. 160, 162, 47 L. Ed. 995, 999, five propositions are laid down covering certain settled principles on this branch of the law and the cases are cited in support of them. The fourth principle reads as follows:—

> "*Fourth.*—The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing, at least, the franchise is not derived from the United States."

The proviso is inserted because a franchise derived from the Federal Government is not subject to taxation as property, nor can the company owning it be taxed for the privilege of exercising it. The leading case on this subject is *California* vs. *Central Pacific Railroad Company*, 127 U. S. 1, 32 L. Ed. 150.

The business of interstate commerce is subjected to an indirect burden in every case where the unit rule of valua-

tion is used in assessing the property of a railroad, telegraph or other similar company. The interstate business of the company is taxed "as a part of its property" (principle 4, *supra*). If this could not be done the state would be unable to tax these properties according to their real value and a very large part of the wealth in the various states would escape taxation. The tax is sustained as a tax on property and the burden on interstate commerce is held to be an indirect burden only.

A number of cases are cited in the *Atlantic & P. Telegraph Company* case, *supra*, in support of the fourth principle. An examination of these cases shows that each was the ordinary and usual case of valuation according to the unit rule.

The issue presented in the *Atlantic & P. Telegraph Company* case was a very narrow one, as the tax involved was a license tax imposed by the City of Philadelphia upon the Telegraph Company based upon the poles located within the city limits.

These cases showing the application of the unit rule of valuation and showing that in them the valuation includes the business of interstate commerce as part of the general property of the Company, cannot control the question presented in the present case. It is true that the Railway Company owns what might be called a "system" in that it owns a railway line located on the bridge and running partly in Missouri and partly in Illinois. It has pointed out, however, that the only intangible property which it owns in Missouri consists of its charter franchise and its bridge franchise.

II

Exceptions to the Unit Rule of Valuation.

There have been a number of cases where the unit rule of valuation for taxation purposes has been resorted to and attacked by the corporation, and the attack has been successful. Any corporation taxed in this way, which has reason to believe that there are special circumstances which

exempt it from the operation of this rule, should prove the facts in order that the question may be fairly determined. In *Adams Express Company* vs. *Ohio State Auditor*, 166 U. S. 185, 223, 41 L. Ed. 965, 978, the Court, on rehearing, speaking through Mr. Justice Brewer, said:—

> "Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable."

In *Fargo* vs. *Hart*, 193 U. S. 490, 48 L. Ed. 761, the State of Indiana undertook to value for taxation purposes the property of the American Express Company located within its limits and applied the unit rule of valuation. The Express Company showed that it owned a large amount of property of great value outside of the state and contended that under these circumstances it was unfair and unreasonable to spread the whole value over the entire line and levy a tax according to mileage. The court said (p. 499):—

> "The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state.

> The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in a state to the whole system. * * *
>
> "It is obvious, however, that this notion of organic unity may be made the means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good-will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretence."

The court held in regard to the tax imposed in this case as follows (p. 502):—

> "It involved an attempt to tax property beyond the jurisdiction of the state, and to throw an unconstitutional burden on commerce among the states."

The property of the Express Company was an instrumentality of interstate business. The tax could not be sustained as a tax upon property for the reasons given and, therefore, it was held to be a tax upon interstate business and stricken down on that account.

In *Union Tank Line* vs. *Wright*, 249 U. S. 275, 63 L. Ed. 602, the state of Georgia undertook to tax certain tank cars, valuing them according to the unit rule of valuation, that is, the entire property of the company was valued and the mileage run in Georgia by the cars compared with the total mileage run by all of the cars of the company. According to this proportion the total valuation was divided and the appropriate percentage taxed as the value of the company's property in Georgia. The court held that the tax was bad. We find the following in the opinion (p. 282):—

> "But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment, or both." Citing cases.

The tax was levied as a property tax, but the valuation was shown to be arbitrary and therefore the tax could not be sustained as a property tax. The conclusion followed that it was a tax upon interstate business, or upon property outside of the state, and bad for either one or both of those two reasons.

In *Wallace* vs. *Hines*, 253 U. S. 66, Adv. O. 64 L. Ed. 500, the State of North Dakota levied a tax upon the Northern Pacific Railway Company, using the unit rule of valuation. The court held that that method did not result in a fair valuation of the property within the state. The court said (p. 69):—

> "North Dakota is a state of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So, looking only to the physical

track, the injustice of assuming a value to be evenly distributed according to main track mileage is plain. But that is not all.

"The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the possession of bonds secured by mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—whatever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state. * * * The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and the taking of property without due process of law. Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 Sup. Ct. Rep. 498; Union Tank Line Co. *v.* Wright, 249 U. S. 275, 282, 63 L. Ed. 602, 607, 39 Sup. Ct. Rep. 276."

The tax violated the commerce clause because, as it could not be upheld as a property tax, it was a tax upon interstate business.

In *Galveston & H. & S. A. R. Co.* vs. *Texas*, 210 U. S. 217, 52 L. Ed. 1031, the court construed a tax imposed by the state of Texas upon the railroad company in the form

of a tax equal to one per cent. of its gross receipts which were derived principally from interstate commerce. The state contended that this was a tax upon property measured by the gross receipts, as this court has held in the case of *Maine* vs. *Grand Trunk Railway Company*, 142 U. S. 217, 35 L. Ed. 994. The Railroad Company, on the contrary, contended that the tax was a tax on gross receipts and under the circumstances a direct burden on interstate commerce. This court said (p. 227):—

> "'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' Postal Teleg. Cable Co. *vs.* Adams, *supra*. See New York, L. E. & W. R. Co. *vs.* Pennsylvania, 158 U. S. 431, 438, 439, 39 L. ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it as its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to affect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate

way, it will not be saved by name or form. Stockard *vs.* Morgan, 185 U. S. 27, 37, 46 L. Ed. 785, 794, 22 Sup. Ct. Rep. 576; Asbell *vs.* Kansas, 209 U. S. 251, 254, 256, ante, 778, 781, 28 Sup. Ct. Rep. 485."

It seems a little peculiar that the Supreme Court of Missouri relied upon this *Galveston Railroad* case in its opinion and also upon the case of *Fargo* vs. *Hart, supra,* discussed in full above, in each of which the tax involved was stricken down as a direct burden upon interstate commerce.

In *Cudahy Packing Company* vs. *Minnesota,* 246 U. S. 450, 62 L. Ed. 827, the tax under consideration was one levied by the State of Minnesota upon a foreign corporation, the owner of certain refrigerator cars which were operated within the state. The tax was levied upon the basis of a fixed percentage of the corporate earnings of the company from the operation of its cars within the state, which were derived largely from interstate commerce. The tax was expressly to be in lieu of other taxes upon such property. The tax was sustained as a tax on property. The court discussed the difficulties of applying the rules which are well settled to the varying circumstances of particular cases and discussed *Meyer* vs. *Wells, F. & Co.,* 223 U. S. 298, 56 L. Ed. 445, and *United States Express Co.* vs. *Minnesota,* 223 U. S. 335, 56 L. Ed. 459. The court, in speaking of these two cases, said (p. 454):—

> "The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that state. The statute called the tax a 'gross revenue tax,' and declared that it was to be 'in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the

property of the company in the state was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state."

III

The Franchise or Privilege to Transact Interstate Business is not Property Subject to State Taxation.

In the present case the tax is levied in the form of a property tax, but the chief item of property subjected to the tax is the bridge franchise, which is not subject to tax by the State of Missouri because it is a franchise or privilege to transact interstate business. The tax is bad for that reason and not for the reason which led to the conclusion in *Fargo* vs. *Hart*, and the *Union Tank Line* case and other

cases cited above, to-wit, that an arbitrary proportion of the valuation of the entire system had been taken as the value of that part of the sytem which is located within the state. The reason for holding the tax bad is therefore not the same in these several cases as in the present case, but the result is the same, that is, a tax levied as a property tax when construed is found to be a tax on interstate business and therefore bad.

The other item of intangible property which, with the bridge franchise, makes up "all other property" assessed at $173,000.16, is likewise exempt from taxation by the State of Missouri. This question was presented in *Philadelphia &c. Mail Steamship Co.* vs. *Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, in which a tax imposed by the State of Pennsylvania upon the Steamship Company, a Pennsylvania corporation, in the form of a percentage of its gross receipts, all of which were derived from interstate commerce, was stricken down. The court said (p. 342):—

> "The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax *on the franchise of doing business*, which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional." (Italics ours.)

In *Henderson Bridge Company* vs. *Kentucky*, 166 U. S. 150, 41 L. Ed. 953, the State of Kentucky levied a tax upon the property, both tangible and intangible, of the Henderson Bridge Company, a Kentucky corporation, which owned and operated a bridge over the Ohio River from Kentucky to Indiana. The statute of Kentucky au-

thorizes a tax upon the franchise as well as the tangible property of bridge companies and this statute was under consideration in the case of *Adams Express Co. vs. Kentucky*, 166 U. S. 171, 41 L. Ed. 960, in which it was held that the word "franchises" as used in the statute was meant to include all intangible property. In the *Henderson Bridge* case the Bridge Company objected to the tax on the ground that it was an interference with the interstate commerce transacted over the bridge. The court said (p. 153):—

> "Clearly the tax was not a tax on the interstate business carried on over, or by means of, the bridge, because the Bridge Company did not transact such business. That business was carried on by the persons and corporations which paid the Bridge Company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore, might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in New York, L. E. & W. R. Co. *vs.* Pennsylvania, 158 U. S. 431, 439, 39 L. Ed. 1043, 1045, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not a mere incidental effect of the requirement of the usual proportional contribution to public maintenance.'"

In the railroad case cited in the above quotation the tax involved was a tax levied upon tolls received by that Company for the use of its railroad by another company. The tax was held to be a tax upon the property of the company subject to the tax, such property being valued ac-

cording to the returns, including the tolls in question. The Railroad Company objected on the ground that the levy of a tax upon the tolls would tend to increase the tolls and thereby constitute a burden upon interstate commerce in which the company paying the tolls was engaged. The court used the following language immediately preceding the language above quoted from the Henderson Bridge opinion (*New York L. E. & W. R. Co.* vs. *Penna.*, 158 U. S. 431, 439, 39 L. Ed. 1043, 1045):—

> "The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad and which tax is measured by a reference to the tolls received. The state has not sought to interfere with the agreement between the contracting parties in the matter of establishing the tolls. Their power to fix the terms upon which the one company may grant to the other the right to use its road is not denied, or in any way controlled."

Then follows the statement quoted in the opinion in the *Henderson Bridge* case to the effect that the interference with interstate commerce is indirect and incidental.

In the *Henderson Bridge* case, although the Bridge Company was not engaged in interstate commerce, the bridge which it owned was none the less an instrumentality of interstate commerce. In *Covington & Cincinnati Bridge Company* vs. *Kentucky*, 154 U. S. 204, 38 L. Ed. 962, the State of Kentucky undertook to regulate the tolls charged over the bridge owned by the Bridge Company spanning the Ohio River from Cincinnati in Ohio to Covington in Kentucky. This regulation of the tolls was objected to by the Bridge Company on the ground that it was a regulation of interstate commerce. The court said (p. 218):—

> "With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and

to argue that, while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in Gibbons *vs.* Ogden, *22* U. S. 9 Wheat. 1, 189, 6 L. Ed. *23*, 68, to be 'intercourse' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the Bridge Company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

In view of these authorities, a tax levied upon a bridge as property is not a burden upon interstate commerce, nor is a tax levied upon the business of the Bridge Company an unlawful burden upon interstate commerce, as the Bridge Company is not a common carrier and not engaged in interstate commerce, although it owns an instrumentality of that commerce. The only basis for an attack upon any such tax would be that a tax upon the instrumentality of interstate commerce valued with reference to the tolls received would tend to increase the tolls charged by the Bridge Company for the transaction of interstate commerce over the bridge. This, as shown above, has been held to be too indirect and incidental to make the tax an unlawful burden upon interstate commerce.

On the other hand, these cases show that a tax upon parties engaged in interstate business upon the bridge is an unlawful burden upon interstate commerce. In the present

case the Railway Company is engaged in the transaction of interstate business over the Eads Bridge and in the transaction of this business it makes use of the bridge under the right or franchise conferred upon it for that purpose by the bridge contract. A tax upon that right or franchise is a tax upon the right or franchise to transact interstate business and is a direct burden upon that business and, therefore, a violation of the commerce clause.

The *Henderson Bridge* case differs from the present case for the reasons indicated. The Court sustained a tax upon the franchise of the Bridge Company, giving that franchise a very substantial valuation. In the opinion the Court said (p. 153):—

> "$865,157.46 was fixed by the Board as the value of the Company's franchise."

There was no valid objection to the assessment of the franchise of the Henderson Bridge Company, for that Company was not engaged in interstate business and had no franchise authorizing it to engage in that business. The difference between that case and the present case, therefore, is that in the present case the two franchises which are assessed for taxation as intangible property both authorize the Railway Company to engage in interstate business, and that Company is engaged in that business under the authority of those two franchises.

The present case and *Gloucester Ferry Company* vs. *Commonwealth of Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158, are very much alike.

The Gloucester Ferry Company, a New Jersey corporation, operated ferry boats from Gloucester in New Jersey to the City of Philadelphia, Pennsylvania. All of its business was interstate business. It leased a wharf in Philadelphia upon which it landed its passengers. The State of Pennsylvania levied a tax upon the capital stock of the Ferry Company on the theory that it was subject to taxation by

that state. The Supreme Court of Pennsylvania sustained the tax. (Gloucester Ferry Co. *vs.* Commonwealth, 98 Pa. 105.) The Pennsylvania tax upon the capital stock of corporations is a property tax, and in cases where it has been levied upon foreign corporations is held to be a tax upon that part only of the property of the corporation which is located in the state. It is shown in the opinion of the lower Pennsylvania Court, which is copied in the report of the case in the Pennsylvania Supreme Court, (98 Pa. 107-111), that only one-half of the capital stock of the Ferry Company was assessed for taxation on the theory that one-half of its property was located in Pennsylvania. This Court reversed the Supreme Court of Pennsylvania and held that the tax was a direct burden upon interstate commerce. The tax was in form a property tax, but the Ferry Company had no property in the State of Pennsylvania except a leasehold interest in the wharf. This Court held that it was immaterial whether the wharf as property was taxed to the owner or to the lessee. That property was, of course, subject to the ordinary property tax. The right to use the wharf, however, was the right to use an instrumentality of interstate commerce and could not be taxed.

The Court, in speaking of the power of Congress under the commerce clause, said (p. 203):—

> "The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety."

And again (p. 204):—

> "As to the second reason given to the decision below,—that the company could not lease its wharf in Philadelphia except by the implied consent of the legislature of the Commonwealth, and thus is dependent

upon the Commonwealth to do its business, and therefore can be taxed there—it may be answered that no foreign or interstate commerce can be carried on with the citizens of a state without the use of a wharf or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a state to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce."

And again (p. 211):—

"It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid; and that business, as already said, is an essential part of the transportation between the states of New Jersey and Pennsylvania, which is itself interstate commerce. While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with and an obstruction of the power of Congress in the regulation of such commerce."

This *Gloucester Ferry* case was discussed in *Philadelphia &c. Mail Steamship Co. vs. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, and the Court said, in commenting upon it (p. 343):—

"It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that

case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

The above quotation from the *Mail Steamship* case is cited with approval in *Western Union Teleg. Co.* vs. *Kansas* ex rel. *Coleman*, 216 U. S. 1, 23, 54 L. Ed. 355, 364. Of course, the *Gloucester Ferry* case is a leading case and has been very frequently cited and fully discussed.

If the facts of the present case are changed in form but not in substance, the case becomes practically the duplicate of the *Gloucester Ferry* case. Suppose the Railway Company instead of being organized under the laws of Missouri were organized under the laws of Illinois, and suppose further that the tangible property which the Tax Collector in the present case has assessed for taxation did not in fact belong to the Railway Company but belonged to the Bridge Company and the only property within the State of Missouri in which the Railway Company had any interest, was its right to run over the Missouri end of the bridge given to it by its bridge contract, the situation presented would be in every respect similar to the situation presented in the *Gloucester Ferry case*. The Company operating in Missouri would be an Illinois Company, and its business in Missouri would be the landing of its passengers from Illinois at the Missouri end of the bridge and the picking up of passengers at that point and transporting them over the Missouri end of the bridge into Illinois and landing them at the Illinois end of the bridge. The Railway Company's right to operate on the Missouri end of the bridge would be very similar to the Gloucester Ferry Company's right to land its passengers on the wharf in Philadelphia which it had leased from the owner. A tax by the State of Missouri upon the right of the Railway Company to use under its bridge contract the Missouri end of the bridge for its interstate commerce would be a tax upon the privilege of using an instrumentality of in-

terstate commerce. An instrumentality of interstate commerce may be taxed as property, but the right or privilege of using such an instrumentality for interstate business cannot be taxed.

In the hypothetical case suggested above, the Railway Company was a foreign corporation being organized under the laws of Illinois instead of a domestic corporation, but as the objection to the tax is that it violates the commerce clause of the Federal Constitution, it can make no difference whether the corporation is a domestic corporation or a foreign corporation. In *Philadelphia &c. Mail Steamship Co.* vs. *Pennsylvania, supra,* the company upon which the tax was levied was a domestic corporation, but the tax was stricken down on the ground that it was a tax upon interstate business. It is also true that in the hypothetical case suggested, the Railway Company owned no tangible property, whereas in the present case the Railway Company does own certain tangible property. This difference cannot, however, be of any importance for the Tax Collector has taxed the tangible property and the Railway Company makes no objection to that tax. It objects to the tax on "all other property," which the statutes of Missouri require shall be separately assessed. This analysis shows that the present case comes directly within the authority of the *Gloucester Ferry Company* case.

In *Louisville & Jeffersonville Ferry Company* vs. *Commonwealth of Kentucky,* 188 U. S. 385, 47 L. Ed. 513, the State of Kentucky levied a tax upon the franchises of the Ferry Company, a Kentucky corporation, which operated a ferry between Louisville, Kentucky and Jeffersonville, Indiana. Certain franchises granted by the State of Indiana were included in the valuation. The syllabus reads:

> "A Kentucky corporation operating a ferry across the Ohio River is deprived of its property without due process of law by the action of that state in including for purposes of taxation, in the valuation of the franchise derived by the corporation from Kentucky, the

> value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired."

The decision is therefore based upon the due process clause on the theory that the Indiana franchise, having its situs in Indiana, was not subject to taxation by Kentucky. The Ferry Company also presented a defense under the commerce clause. On this point the court said (p. 398):—

> "As what has been said is sufficient to dispose of the case, we need not consider the question arising upon the record and urged by counsel, whether the taxation by Kentucky of the Ferry Company's Indiana franchise to transport persons and property from Indiana to Kentucky is not, by its necessary effect, a burden on interstate commerce forbidden by the Constitution of the United States."

It could make no difference whether the franchise to transport persons and property from Indiana to Kentucky, or from Kentucky to Indiana, was granted by the State of Indiana or by the State of Kentucky. The objection to taxing the franchise would, in either case, be based upon the argument that the tax would be a tax upon interstate business. Property, either tangible or intangible, may be valued for taxation according to the use to which it is put, even though that use is the transaction of interstate business, but if the tax is upon the use, or upon the interstate business, or the right to transact that business, it is a direct burden upon interstate commerce and cannot be sustained. If the right or franchise to transact interstate business could be taxed as property, a foreign corporation owning no property within the state, but transacting interstate business exclusively therein, would be subject to state taxation upon its business or the right to transact it considered as property. A tax upon the right or franchise to transact interstate business is just as much a tax upon that business as a tax upon the gross receipts or tolls derived from that business.

IV.

The Use of an Instrumentality of Interstate Commerce is not Subject to Taxation by a State.

In the present case, the instrumentality of interstate commerce is the bridge. The bridge is not owned by the Railway Company but is owned by the St. Louis Bridge Company. The State Board of Equalization assesses the bridge for taxation year by year, including both its tangible and intangible property. The tangible property for the year 1907 was assessed at $1,200,000, and the intangible property as "all other property" at $700,000. The details of this assessment are shown in Paragraphs 11 and 17 of the Agreed Statement of Facts (Record, p. 17 and 27). The tax against which the Railway Company is protesting is a tax upon the right or privilege of using the bridge. A tax by a State on the use of an instrumentality of interstate commerce is invalid. In *Postal Telegraph Cable Co.* vs. *Adams*, 155 U. S. 688, 39 L. Ed. 311, the State of Mississippi levied a privilege tax upon the Telegraph Company which was shown to be not in excess of what an ad valorem tax on the property within the State would have amounted to. The tax was sustained as "substantially a mere tax on property and not imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power." The Court also said (p. 696):—

> "Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and, by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon

property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland, C. C. & St. L. R. Co. *vs.* Backus, 154 U. S. 439, 445."

In this case the instrumentality of interstate commerce, which was the telegraph line, made up of poles and wires, &c., belonged to the company which was subjected to the tax. The tax was construed as a tax upon the property and not a tax upon the use to which the property was put, although the valuation of the property for taxation purposes was materially influenced by the use. If the instrumentality of interstate commerce had been owned by one company and the use of that instrumentality had been owned by another engaged in interstate business, and the tax was levied upon the other, the tax would have been held bad as a burden upon interstate commerce.

In *St. L. S. W. R. Co.* vs. *Arkansas*, 235 U. S. 350, 59 L. Ed. 265, the State of Arkansas levied upon the railway company for the privilege of exercising its franchise in the state a tax of a specified percentage of the capital stock represented by property in the state. It was held to be a tax upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the company in the state. The railway company paid taxes upon its property under another statute and claimed that it was subjected to double taxation. It relied upon the quotation above from the *Adams* case, *supra*, to sustain its claim. This court said (p. 366):—

"Reference is made to an extract from the opinion in the Adams Case, 155 U. S. 606, where the court said: 'Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or

for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 439, 445, 38 L. ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.' This, however, does not mean, as is contended, that because of the 14th Amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce. The court was dealing only with the commerce clause, and the language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445."

The property in the state was employed in interstate commerce, but the method pursued in valuing that property for taxation purposes was within the rule and no attempt was shown to levy a tax upon interstate commerce.

In *C. C. C. & St. L. R. Co.* vs. *Backus*, 154 U. S. 439, 38 L. Ed. 1041, the State of Indiana levied a tax upon the

property of the railroad company according to the unit rule. The opinion contains an exceptionally clear statement of the difference between a valuation of property for taxation purposes according to the uses to which it is put and a tax upon interstate commerce. We quote from it as follows (p. 445):—

> "The rule of property taxation is that the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. Take for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply

on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same, one between Cincinnati and Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this court, a ruling demanded by the harmonious relations between the states and the national government, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what cannot be done directly—that is, to cast a burden on interstate commerce. It comes rather

> within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of inter-state commerce, or a direct burden upon its free exercise."

The tax involved was a tax upon that portion of the system of the Railway Company located in Indiana, but the court considered the question whether either Indiana or Kentucky could tax a bridge across the Ohio River between the two states over which all of the business transacted would be interstate. The court held that the Bridge Company could be taxed and for that purpose valued with reference to the interstate business transacted over it. The court was careful, however, to limit the conclusion to ordinary property taxation, and said that no state could

> "attempt to impose the added burden of a license or other tax for the privilege of using, constructing or operating any bridge or other instrumentality of interstate commerce, or for carrying on of such commerce."

In the present case the Railway Company comes expressly within the scope of this principle. The tax must be held bad because it is a tax upon the privilege of using the bridge.

The instrumentality of interstate commerce was owned in the *Backus* case by the Railroad Company and it was difficult, in fact impossible, for that company to show that the tax was a tax upon the use and not upon the property. In the present case the instrumentality of interstate commerce, that is, the bridge, belongs to the Bridge Company and not to the Railway Company.

The State of Missouri assesses for taxation the bridge in the name of the Bridge Company, valuing it according to its various uses, and there is no difficulty in showing that the tax upon "all other property" of the Railway Company is a tax upon the use of the bridge, that is, the right to use it, for all that the Railway Company owns is the right or franchise or privilege of using the bridge .

V.

Conclusion.

The intangible property of the Railway Company, which is assessed for taxation as "all other property," and valued at $173,000.16, consists of the charter franchise of the Railway Company and its bridge franchises. The Supreme Court of Missouri has upheld this tax, using the following language in support of its conclusion (Record, p. 62):—

> "In the case at bar the bridge as a bridge, embracing its multiform uses as such, was taxed against the owners thereof, but that assessment in no wise precluded the State Board of Equalization from making another assessment against the corporate grantee of a contract of user of a right of way for its electric trolley line over said bridge."

We believe that this conclusion is not sound for the following two reasons:—

First.—The tax is not a tax upon property, excepting only the two franchises considered as property, and these two franchises are the franchises under which the company transacts interstate business only and therefore the tax is a tax upon interstate business; and

Second.—The two franchises which are taxed as property together confer upon the Railway Company the right to use the bridge for its interstate business, that is, the right to use an instrumentality of interstate business, and such right of user is not subject to state taxation.

If either the charter franchise or the bridge franchise is not subject to state taxation, the tax must be stricken down.

All of which is respectfully submitted.

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APPENDIX.

REVISED STATUTES OF MISSOURI, 1909.

SEC. 11553. *What railroads are taxable.*—All railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all other property, real, personal or mixed, owned, hired or leased by any railroad company or corporation in this state, shall be subject to taxation for state, county or other municipal or local purposes, and taxes levied thereon shall be levied in the manner hereinafter set forth. (R. S. 1899, §9338.)

SEC. 11554. *Railroad companies to make statement to state auditor.*—On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or side tracks, with depots, water tanks and turntables, the length of such road, double or side tracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof. (R. S. 1899, §9339.)

SEC. 11555. *Duplicate statement to county clerks.*—In addition to the statement required by the preceding section, the president or other chief officer of every railroad company shall, on or before the first day of January in each

and every year, furnish to the clerk of the county court of each and every county in this state in which said road or roads may be located, a duplicate statement of their property in such county as required in the preceding section, duly subscribed and sworn to by said president or other chief officer. (R. S. 1809, §9340.)

SEC. 11556. *Duties of county court.*—At the next term of the county court after such statement is received, the clerk shall lay it before the county court, and the court shall examine the statement and determine the correctness thereof as to the description of property and valuation thereof; and if found correct, the court shall cause the clerk thereof to certify to the correctness of the statement, under the seal of the court, and forward the certificate to the state auditor on or before the first day of April next thereafter; if found in the opinion of the county court to be incorrect, or the value thereof not sufficient or inadequate, the court shall proceed immediately to ascertain what property has been omitted, and shall return a description thereof to the state auditor; and all property thus omitted and returned shall be taxed at double its cash value. The county court shall forward an official statement of what they believe to be the actual cash value of all property reported to them by the chief officer of the railroad companies, and also of the property which they may find not so returned, if any, of the kind mentioned in Section 11554, belonging to or under the control of such railroad company, and shall make return thereof, under the seal of the court, to the state auditor on or before the first day of April next; and if the county court shall fail to make or cause to be made the certificate herein required and in the time specified, the clerk shall make the certificates and a certificate that the court has so failed. (R. S. 1899, §9341.)

SEC. 11557. *When company fails to make returns, duty of board.*—Should any railroad company fail to make and return to the state auditor and county clerks any of the

statements required by the foregoing provisions of this chapter, the said board shall ascertain the property of such company, from the best information they can obtain, and shall fix the value thereof; and their action on the same shall be filed in the office of the state auditor as herein required. (R. S. 1899, §9342.)

SEC. 11558. *Duty of state auditor.*—On the third Monday of April in each year, the state auditor shall lay before the state board of assessment and equalization all returns made to him by every railroad company and county clerk. (R. S. 1899, §9343.)

SEC. 11559. *State board of equalization, how composed—duties.*—The state board for the assessment and equalization of railroad property shall be composed of the governor, secretary of state, state auditor, state treasurer and attorney-general, and shall meet annually at the capital, in the city of Jefferson, on the third Monday of April of each year, for the purpose of assessing, adjusting and equalizing the valuation of such railroad property. The said board shall proceed to assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 11554. The board shall have the power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other property belonging to said railroad companies, or property belonging to any railroad companies in this state of the kind specified in section 11554, upon which no returns have been made, which may be otherwise known to them, as they may deem

just and right. In assessing, adjusting and equalizing any railroad property for any year or years, the state board may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the board may think it is entitled to: Provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said board shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company. (R. S. 1899, §9344.)

SUBJECT INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, (a Corporation), Plaintiff in Error, vs. THE STATE OF MISSOURI, at the Relation and to the Use of JAMES HAGERMAN, JR., Collector of the City of St. Louis, in the State of Missouri, Defendant in Error.	No. 261.

In Error to Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This action was instituted in the Circuit Court of the City of St. Louis by the State of Missouri at the relation of the Collector of Revenue, to collect certain

taxes for the year 1907, assessed by the State Board of Equalization against .304 mile of a railroad owned and operated in the City of St. Louis by the plaintiff in error, which we shall designate as the Railway Company.

The taxes were assessed against the property located in this State belonging to the Railway Company under the provisions of the statutes which are now numbered 11551-11567, R. S. Mo. 1909 (being Articles XI and XII of Chapter 117). Every step required by the statutes in the procedure relating to the assessment of taxes against railroads was declared by the Supreme Court of Missouri in this case to have been properly taken by the various officers charged with the duties of levying and assessing these taxes. The case was tried on an agreed statement of facts (Tr., pp. 15-35).

The Railway Company was organized as a railroad corporation under the laws of Missouri in 1899, and in 1906, at the time of this assessment, was operating a street railroad on the upper roadway of the Eads Bridge, running from one end of the bridge to the other, across the Mississippi River, a total distance of .865 of a mile. Of this total length .346 mile was located in Missouri and the remaining .519 of a mile was on the Illinois side of the bridge. There is no difference in the nature, character or structure of the bridge throughout its entire length, or in the part of the railway on

the Missouri side from that on the Illinois side of the bridge. The Railway Company owns the rails, tracks, trolley poles, trolley wires; owns some and leases other cars running over its tracks, and has a lease or exclusive monopoly to operate a railroad over this highway for fifty years, and has valuable operating contracts with two other street railway companies.

While the Railway Company runs only from one end of the bridge to the other, as a matter of fact, the same cars operating on the bridge on and for the Railway Company run from the Missouri end across the bridge and continue on into Illinois beyond the Railway Company's tracks for great distances through the State to other cities. By a contract arrangement these cars are provided and operated by another company, which furnishes the power, motormen, conductors, cars and other equipment and service to this defendant for a division of the fare, so that passengers get a continuous ride, not only across the bridge over the entire length of the defendant's railroad, but, without changing cars, on through the State of Illinois, through long distances, to their destination, over other lines, with interchangeable fares and coupon tickets. The Railway Company's responsibility for the cars terminates at the end of the bridge, but its business is helped and the convenience of the passengers subserved by a continuous passage

not requiring a change of cars, and its road and securities much increased in value thereby.

On April 11, 1902, the Railway Company entered into a quadripartite agreement with the Terminal Railway Association of St. Louis, a Missouri corporation, as party of the first part; itself as party of the second part; the East St. Louis Electric Street Railroad Company, party of the third part; and the East St. Louis & Suburban Railway Company, party of the fourth part (see supplement to transcript), in which the Railway Company, besides securing an exclusive contract from the Terminal Railway Association, a Missouri corporation, giving it an easement for use of the upper roadway of the Eads Bridge to operate a street railway over the bridge, for a period of fifty years, also received by virtue of that contract many other very valuable rights.

In the preamble of the contract appear the following clauses (appendix or supplement to transcript, p. 2):

> "Whereas, it is the intention of each and every of the parties hereto and the purpose in executing this agreement to hereby cause, during the life of this contract, all passenger traffic originating on any of the lines of said Suburban and East St. Louis Companies, and on any electric railway lines hereafter owned, operated or controlled by them, or either of them, destined to cross the Mississippi River between the Cities of St. Louis

and East St. Louis, and originating in the City of St. Louis and destined to cross said river, between said cities, to any point on any of the lines of said East St. Louis and Suburban Companies, or to any point on any electric railway line hereafter owned, operated, or controlled by them, or either of them, to pass over said bridge; and

Whereas, it is the desire of the Terminal Company, and one of the considerations inducing it to enter into this agreement, that through cars may be operated, in continuous runs and without change of cars, over said bridge and over the line of said East St. Louis Company, and by transfer to all points on the line of said last named company and the lines of said Suburban Company, as well as to all points on electric railway lines that may be hereafter at any time owned, operated, or controlled by either of said companies; and

Whereas, it is the desire and purpose of said Bridge Electric Company and of said East St. Louis Company that such arrangements shall be entered into between them whereby through cars may be operated in continuous runs and without change over their respective lines, the making of such arrangements being a consideration inducing said last named companies to enter into this agreement."

In paragraph II of said contract (appendix or supplement to transcript, p. 7), the parties of the second, third and fourth parts agreed that the respective railway lines:

"Shall at all times be so operated as to direct all travel originating at or destined to any point on any line of any one of said parties of the second, third or fourth part, or on any electric railway line now or at any time hereafter operated, owned or controlled, jointly or by any one of said parties of the second, third and fourth parts destined to cross the Mississippi River at any point between the City of St. Louis, Missouri, and the City of East St. Louis, Illinois, to said bridge, to the end that all such street or car passenger traffic may and shall pass over said bridge."

In paragraph III all of the parties agree:

"That through cars shall be operated in continuous runs and without change over the street railway lines of the parties of the second and third parts, with such frequency as may be determined by the general manager of said Terminal Company, to the end that street car passenger traffic may pass without change of cars over the upper roadway of said bridge and over the line of said East St. Louis Company, and by transfer to all points on the line of said last-named company."

Paragraphs IV, V and VI are as follows (appendix to transcript, p. 8):

"IV. In consideration of the benefits accruing to said parties of the second, third and fourth

parts from the execution of this agreement in enabling them to provide for the movement of through cars without change over their respective lines and over the upper roadway of said bridge, and of the other benefits resulting to them therefrom, said parties of the second, third and fourth parts, and each of them, hereby further covenant and agree, to and with said Terminal Company that they, said parties of the second, third and fourth parts, or any one of them, will not at any time hereafter enter into any agreement, contract or understanding with any company, corporation, person, or persons owning, controlling, leasing or operating any other bridge crossing said Mississippi River at any point between said cities of St. Louis and East St. Louis, now or at any time hereafter constructed, whereby street car traffic of any character, originating on any line of any of said parties of the second, third and fourth parts, shall be permitted to pass over any such bridge or bridges, now or at any time hereafter constructed.

"V. Said parties of the second, third and fourth parts hereby covenant and agree, each with the other and with said Terminal Company, that if at any time hereafter, and so often as other electric railway lines shall be constructed which shall connect with any one of the railway lines now or at any time hereafter operated, owned, or controlled by any one of said parties of the second, third and fourth parts, an (and) arrangement shall and will be made between said parties of the second, third and fourth parts and such

new line, if such new line shall desire such arrangement made, whereby traffic originating on or destined to any point on said new line, and destined to or from said City of St. Louis by way of East St. Louis, shall pass over said upper roadway of said bridge.

"VI. In consideration of the premises, said Terminal Company hereby covenants and agrees to and with said parties of the second, third and fourth parts, and each of them, that it will not at any time hereafter become in any manner interested in any street railway line in the City of East St. Louis or in the territory adjacent or tributary thereto."

The Railway Company is bonded for $500,000, on which bonds it pays 5 per cent interest, and it has in addition a capital stock of $500,000, upon which it pays regular dividends (Tr., p. 34). All of the bonds and stock of the Railway Company, as well as the bonds and stock of the East St. Louis & Suburban Railway Company (the operating company) are owned by the East St. Louis & Suburban Company, which also owned the stock of the other connecting companies running over the bridge, so that an additional value was given to the railway property in this state by reason of its close and intimate association not only with the rest of the same railroad in the State of Illinois, but with other railroad corporations with which it had a working arrangement for continuous journeys for its pas-

sengers. The gross receipts in 1906 were $165,959.47 (Tr., p. 34) and operating expenses, $99,575.68.

The trial court found that the capital stock of the Railway Company fairly represented the value of both the tangible and intangible property (Tr., p. 54) and that the defendant's property produced an income in 1906 of about 7½ per cent on $500,000.00. That the defendant's property east of the Missouri state line is of no value as a railroad, except when used with that west of the line, and the converse is equally true. That the defendant made its intangible property part of its capital. That the Court will presume that the Board of Equalization did its work properly, and that the tax bill carries this presumption.

The statutes in question were originally adopted in 1901 and are as follows:

> "Sec. 11551 (R. S. Mo. 1909). **To Be Assessed, How—Tax Due and Payable, When.**—The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all quasi-public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the

same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation (Laws Mo. 1901, p. 232).

"Sec. 11552. **Valuations, How Fixed and by Whom.**— The State Board of Equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations whose property the State Board of Equalization is now or may hereafter be required to assess, and the county assessor, in case of the other quasi public corporations referred to in the preceding section, **shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intangible, in this state**, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, **under the head of 'all other property.'**" (Bold-face type ours.)

The assessment of the tangible property and rolling stock was made strictly in accordance with section 11559, and the board adjusted only such proportion of the total value of all the rolling stock of the company

as the number of miles of the road in this state bears to the total length of the road owned or controlled by the company. This section further provides that

> "in assessing, adjusting and equalizing any railroad property for any year or years, **the State Board may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgments, by the testimony which may be adduced, further than to give it such weight as the board may think it is entitled to.**"

Section 11553 provides that all railroads now constructed, etc., "**and all other property,** real, personal or mixed, **owned, hired or leased** by any railroad company", etc., shall be taxed in the manner set out in the succeeding section, in Chapter 117 of Article XII, R. S. 1909.

Section 11559 states the duties and powers of the Board of Equalization, and provides, in addition to the provision already quoted above,

> "that **when any railroad shall extend beyond the limits of this state, and into another state, etc., * * * then the board shall assess, equalize** and **adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned** or **controlled by such company.**"

Section 11578 makes the certificates of the auditor setting forth (1) the entire length of the road, (2) the valuation per mile, (3) the total value of the rolling stock, (4) the total length of the roadbed in the county, (5) the total value of the roadbed, sidetracks and rolling stock as apportioned to the county by the board, (a) prima facie evidence of the facts set out therein, (b) that every act required to be done by the board under the provisions of this article had been fully complied with, (c) the party offering the certificate shall not be required to produce the records of the board nor any other evidence (cited and applied in State ex rel. v. Met. St. Ry. Co., 161 Mo. 188).

This certificate of the auditor (pages 22 and 30 of the Transcript) is therefore prima facie evidence of the facts set out and also that every act required to be done by the board was fully complied with. There was no evidence at all to overcome this prima facie case.

There are many statements in the agreed statement of facts that have no bearing on this case, but which were inserted partly because there was another case tried with this one involving taxes for 1899, reassessed in 1907. These statements relate chiefly to assessments made for other years against this defendant. None of these statements relate to any taxes or assessments for any year subsequent to the year 1901 (except the taxes in suit for 1907). This is im-

portant, as the statute on which these taxes is based was passed in 1901, for prior to that year no effort was made to tax any "intangible" property of railroads. For this reason no comparison is possible between the assessment for the taxes for the year 1907 with years prior to 1901.

A judgment was rendered by the trial court for the amount of the tax, which was affirmed by the Supreme Court of Missouri.

The seventh paragraph of the opinion of the Supreme Court of Missouri (279 Mo. 616) contains a clear exposition of the nature and character of the tax in question (Tr., p. 64):

> "Under the agreed statement of facts appellant owned a usufruct in about one-third of a mile of railroad track on that portion of the bridge within the limits of Missouri. It also owned, as stated before, the rails, the superstructure and wires which enabled it to operate its trolley cars over this line. It also owned money on deposit in banks in Missouri; also the franchise of operating its railroad, granted to it by the legislature of the state, and consented to by the local authorities in charge of the bridge. All of this property was within the territory of this state, and, therefore, its assessment for taxation did not impose a direct burden upon interstate commerce under the principles declared and the rule stated in the foregoing quotation from the opinion of the Supreme Court of the United States and the

authorities therein cited. The imposition in the case at bar was purely a tax on property as such, locally situated and upon a Missouri franchise, locally enjoyed. It was assessed in strict accordance with the provisions of the statutes of this state and the board of equalization, in making this assessment, was entitled to consider the increase in value of the property assessed by reason of its being an integral part of a railroad engaged in interstate traffic, and they were entitled to discern the value of the property in Missouri from that of the other property of which it was a part, in the manner prescribed in the statute providing for its assessment and sanctioned by the foregoing decision of the Supreme Court of the United States. This, we think, was substantially done in the present case."

The contract for power, crews, cars, equipment, electric power, and other operating necessities was dated Nov. 15, 1902 (Tr., p. 16), and was executed with the East St. Louis & Suburban Ry. Co. some time after the contract of April 11, 1902, which gave the lease on the bridge and created a monopoly of the traffic over the Mississippi River (Tr., p. 34). Neither the Bridge Company nor the Terminal Company was a party to this later contract of Nov. 15, 1902. The agreed statement of facts says (Tr., p. 34): "To increase bridge traffic and for reasons of convenience and economy, the defendant late in 1902 made a from year-to-year contract with the said East St. Louis & Suburban Ry. Co. by which it furnished defendant with power, cars, crews, and equipment, and all other operating expenses, barring taxes, for 60 per cent of the gross receipts. The cars thus furnished * * * with the same motormen and conductors continued on into East St. Louis and some of them through East St. Louis into adjacent Illinois territory," etc. On page 16, Transcript, this contract is also referred to in paragraph 7. This contract gives valuable intangible rights included in the tax on "all other property" and inseparable from the other intangibles.

BRIEF.

I.

The Railway Company in this case owned valuable intangible property other than its charter or franchise to be a corporation and its franchise or lease of the surface of Eads Bridge for the purpose of operating its railroad. The intangible properties were assessed under the classification of "all other property." Nothing appears to indicate that the Board of Equalization did or did not include the right to carry on the business of interstate commerce.

II.

The franchise of a corporation, even though that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation.

St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350;
Atlantic & P. Tel. Co. v. Philadelphia, 190 U. S. 160.

III.

The franchises of a railroad corporation have been held by this Court to mean all of its tangible property. This is clearly the case where the Missouri

statute expressly provides for the taxation of the franchise of a railroad (other than the right to be a corporation) under the head of "all other property."

Adams Express Co. v. Kentucky, 166 U. S. 172;
Branson v. Bush, 251 U. S. 182.

IV.

The whole property owned by plaintiff in error constitutes a railroad. It was properly taxed in its entirety, and there was included in the intangible property all of the franchises and contracts. The Board of Equalization was not required to separate the intangibles and tax each item, or to tax separately the contract granting the use of the bridge.

1 Elliot on Railroads, 7;
Pennsylvania Ry. Co. v. St. L. Ry. Co., 118 U. S. 290;
State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 622;
State ex rel. Western Union Tel. Co., 165 Mo., l. c. 516.

V.

The Missouri law under which this assessment was made was passed in 1901 (Laws 1901, p. 232, now Sections 11551-2, R. S. Mo. 1909) to give a legal basis to the assessment of the intangible property of corporations owning, operating and managing public

utilities, and was undoubtedly based upon the decisions of the Federal Supreme Court holding such intangible values to be property properly taxable in a state in the proportion that the length of the road there bears to the entire system.

State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 622;
St. L., etc. Ry. v. Arkansas, 235 U. S. 350;
State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., 279 Mo. 616.

VI.

The law presumes that the Board of Equalization did its duty in making the assessment and making the computations and valuation upon which it is based. They are the sole judges of the facts and their action is conclusive. The valuation will, therefore, be presumed to be correct. As to details of procedure the statute is directory merely.

State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 662;
State ex rel. v. Western U. Tel. Co., 165 Mo. 502, 516;
State v. Lord, 118 Mo., l. c. 4;
Agan v. Shannon, 103 Mo. 661;
Pittsburgh, etc. Ry. v. Backus, 154 U. S. 421, at 435-6;
State ex rel. v. Hannibal, etc. Ry., 113 Mo. 297, at 308.

It does not appear just what intangibles the board included after they "heard all of the evidence relating to the same".

Illinois Central R. Co. v. Greene, 244 U. S. 555.

The mere overvaluation of this road is not a defense, as the courts will not take on themselves the functions of a revising or equalizing board.

Sec. 11320, R. S. Mo. 1909;
Stanley v. Albany Co., 121 U. S. 535;
Western U. Tel. Co. v. Missouri, 190 U. S. 420.

VII.

The unit rule for the taxation of interstate railroads on the mileage basis is well established.

(a) A state may exact from a railway company a tax upon that portion of its property within its borders, and, in assessing it for the purposes of taxation, take into consideration its value as a going concern and as a part of a general system extending into two states, and may include its intangible property.

State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 662;
St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350;
Adams Express Co. v. Ohio, Etc., 165 U. S. 194, 221;

Cleveland, C., C. & St. L. Ry. v. Backus, 154 U. S. 439, 445;

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 75;

Pullman's Palace Car Co. v. Pennsylvania, 18 Wall. 232 (21 L. Ed. 288);

Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (62 L. Ed. 84);

Galveston etc. R. Co. v. Texas, 210 U. S. 217, 225;

Fargo v. Hart, 193 U. S. 490;

Western U. Tel. Co. v. Taggart, 163 U. S. 1, 14;

Western U. Tel. Co. v. Atty.-Gen., 125 U. S. 530, 552;

Western U. Tel. Co. v. Atty.-Gen., 141 U. S. 46;

Maine v. Grand Trunk Ry., 142 U. S. 217;

Henderson Bridge Co. v. Kentucky, 166 U. S. 150;

Louisville & N. R. Co. v. Greene, 244 U. S. 522;

Atlantic & P. Tel. Co. v. Philadelphia, 190 U. S. 160;

Postal Tel. Cable Co. v. Adams, 155 U. S. 688;

United States Express Co. v. Minnesota, 223 U. S. 335;

Pullman's Pa. Car Co. v. Penn, 141 U. S. 18, 22;

Wisconsin etc. Ry. Co. v. Powers, 191 U. S. 379;

Pullman Co. v. Kansas, 216 U. S. 56, 63.

(b) The only limitations upon a tax on property used in interstate commerce are: (1) That its payment must not be made a condition precedent to the right to do business; (2) the enforcement must be left to the ordinary means devised for collecting taxes; (3) that the ascertainment of the amount is made dependent on the value of the property situated in the state; and (4) it must not be subjected to an unfair share of taxation if the railroad owns unusually valuable propertes such as terminals, tunnels, bridges, real estate, bonds, etc., in another state not matched by like properties in the taxing state.

(c) To be objectionable, interference with interstate commerce must be direct and not the mere incidental effect of the requirement of the usual proportional contribution to the public maintenance.

(d) Missouri's system of taxing railroad property in Missouri, and the intangible property under the heading of "all other property", as followed in this case, is only a property tax on property in this state and is not an interference with interstate commerce and is not a tax on receipts nor a mere tax on the use of an instrumentality of commerce (see cases cited above).

VIII.

It is the use of property which gives it value. Necessarily, therefore, the use of property in interstate commerce greatly increases the value of the property so used. That value is properly taxed, particularly when combined with all of the intangible property of a railroad under the classification of "all other property" as provided by the Missouri statutes.

Sections 11551-2, R. S. Mo. 1909;
Cleveland, C., C. & St. L. Ry. v. Backus, 154 U. S. 439.

IX.

This railroad was a small part of an immense system of street car and interurban railroads. It derived much of its value from the fact that it had contracts with the rest of the system making it part of the big whole and enabling it to operate without the actual investment of capital. The fact that part of its own value is derived from its use in interstate commerce will not permit it to escape state taxation on its real value (see cases cited under VII, supra).

ARGUMENT.

There is but one question in this case, and that is, whether the taxation of the intangible property in the State of Missouri of the Railway Company on a mileage basis is or is not a tax on interstate commerce.

The brief of plaintiff in error considerably narrows the limits of the controversy by its claim that the only intangible property of the Railway Company which is taxed as "all other property" is the charter franchise of the Railway Company, and what plaintiff in error calls the bridge franchise, or the right to use the bridge, and by the claim that both franchises are used for the transaction of interstate business, and that, therefore, a tax upon these franchises is a tax upon interstate business, and therefore bad.

It is conceded in the brief of plaintiff in error (p. 13) that the unit rule of taxation for railroads and street railroads running in different states is well settled; that the business of such companies is the most important factor in determining values; that such tax is not a burden upon interstate commerce, but is a property tax and a reasonable measure of the value for that portion of the road located in the taxing state, and that even the inclusion in the value by the state for taxation of such franchises as those granted by the Federal Government to telegraph com-

panies is not objectionable; and it is also conceded that a tax by the state on the interstate business of a railroad company by the unit rule is valid as a tax on property, and that the burden on interstate commerce is indirect only.

The contention of plaintiff in error is that the Railway Company in this case is an exception from the unit rule, and is like those cases where the portion of the system within the state was given a greater value in comparison with the entire system than was justified, and plaintiff in error contends (p. 23) that the tax is bad as a property tax because the chief item of property subjected to the tax is the bridge franchise, which is not subject to a tax by the State of Missouri because that franchise evidences a privilege to transact interstate business and the tax is bad because imposed upon the right or privilege of using the bridge (p. 34).

The fatal difficulty with the contention of the plaintiff in error is that it overlooks and ignores other valuable intangible property which it had in addition to its charter from the state and its so-called franchise to operate a railroad which it got from the owner or lessee of the Eads Bridge. The plaintiff in error had a very valuable contract, dated April 11, 1902, which it entered into with the Terminal Railway Association of St. Louis, the East St. Louis Electric Street Railroad Company and the East St. Louis &

Suburban (see Supplement to Trans.), and also a contract of Nov. 15, 1902, with the Suburban Co. (Tr., pp. 16, 34). By the terms of this agreement it secured, in addition to its right to operate a railroad across the Eads Bridge which it secured in 1889, a valuable working arrangement with three other railroads; (first) for the purpose of securing a monopoly of business of carrying passengers on street cars across the Mississippi River between St. Louis and East St. Louis, and becoming part of a great street railway and interurban system; (second) for the operation of its railroad across the bridge, in the way of motive power, motormen, conductors, operators and cars; (third) for a practical working arrangement with two other street car lines to transfer to all points on the line and by which the same cars running over the bridge would be operated into East St. Louis and Illinois to distant points without the necessity of a change of cars, securing a continuous run, thus avoiding inconvenience to passengers and securing a valuable benefit to itself; (fourth) it became unnecessary to build power houses, install dynamos, make electrical power, build terminals, car sheds, buy cars or other equipment, look after the employment of motormen and conductors and other workmen, or operate offices and office force necessary to look after all such details as to arrangement and contract with the other railways supplied all these necessities without the investment of capital, merely by the payment of a rental in the

form of a division of affairs, and (fifth) it was saved the great outlay and investment of capital otherwise necessary to supply such plants and equipment.

This important omission by plaintiff in error from its statement and brief, utterly overthrows its argument, as its whole case is rested upon the theory that it had no intangible property other than its right to use the bridge. This omission was doubtless due to the fact that the contract of April 11, 1902, was not set out at length in the agreed statement of facts, but on account of its length was attached as an appendix (Tr., p. 16.) Even its printing and filing here was overlooked by plaintiff in error until nearly a year after the filing of the Transcript of the Record. (See endorsements on Tr., p. 87, and App., p. 12.)

These contractual rights were in no way involved in interstate commerce in the use of the bridge, and were derived from corporations that had no connection with the bridge. They were necessarily included in the intangible property of the Railway Company. **The contention of plaintiff in error that it had no other property than its so-called "franchise" to use the bridge is therefore not based on the facts. Its surmise that this "franchise" was the only intangible property taxed, or that it was taxed at all, is only a surmise and not based on the facts in the record.**

The Railway company ran only from one end of the bridge to the other .865 of a mile, of which

.346 of a mile was in Missouri. This railway could not possibly operate without the Missouri end, and each separate part of the whole is equally important with the other. All that the railway company has, both of tangible and intangible property, it is quite apparent, is used equally in Illinois and in Missouri over the entire length of the railway. This is peculiarily a case where a tax on the mileage basis is a fair and reasonable method of getting the approximate value of that part of the railway in Missouri. Its entire property, tangible and intangible, is properly measured by the length of its tangible road. It does not own valuable power-houses, electrical plants or terminals at either end of the road. Its property is homogeneous in both states and throughout the entire length of the .865 mile of railway.

Just what items the Board of Equalization took into consideration when it fixed the value of the intangible property which it classified "as all other property," as provided by the statute, does not appear from the record. Judge Kinsey, the trial judge, in his memorandum filed with his decision said (Tr., p. 53):

> **"While the Board of Equalization is required to keep a record of its proceedings and orders, yet that does not mean that the evidence which the board hears, and upon which it bases its**

orders shall appear of record. It is enough that its records show that there was laid before it the subject matter of the assessment and equalization of taxes on property under its jurisdiction which is owned by persons or corporations named in the record, that the board has duly considered the same, made an assessment and recorded ..s action in so doing. The agreed statements show that this was done * * * (Tr., p. 54). Of the total assessed value, $186,019.98 is apportioned to the State of Missouri upon mileage basis as representing the value of its property in this state to taxation. Of this last named sum, $173,016.00 is classified, in accordance with the statutes, as 'all other property,' and is evidently intended to represent the value of the defendant's intangible property in this state. **Of what this intangible property consists is not disclosed by the record.** The defendant's property east of our state line is of no value as a railroad except when used in conjunction with that west of the line and the converse is equally true. In no way could the value of the part in each state be ascertained, except by using the mileage or unit rule." (Boldface type ours.)

The statutes under which the tax was assessed have been fully considered by the Supreme Court of Missouri, not only in this case (279 Mo. 616) (Tr., p. 59), but also by Judge Fox in the case of State ex rel. v. Wiggins Ferry Co., 208 Mo. 622, where the constitutionality of the law was upheld, a similar application

of the statutes approved, and the claim that it resulted in a tax on interstate commerce utterly refuted.

In his opinion in this case (279 Mo. 616), Judge Bond of the Missouri Supreme Court said:

> (Tr., p. 61) "The property, tangible and intangible, owned and operated in this state by defendant, possessed great value and earning power and to provide for its taxation the statutes relating to the taxation of franchises, other than that of corporate entity, were enacted (Laws 1901, p. 232; R. S. 1909, Secs. 11551, 11552). The method and plan of assessment in valuation prescribed in these statutes was scrupulously followed by the state board of equalization. * * * (Tr., p. 63) The description of the property taxed, the itemization of amounts, discloses that they were referable only to tangible and intangible property of defendant within the territorial limits of this state. * * * (Tr., p. 64.) It was assessed in strict accordance with the provisions of the statute of this state and the board of equalization, in making this assessment, was entitled to consider the increase in value of the property assessed by reason of its being an integral part of a railroad engaged in interstate traffic."

The use of bridge is not test of validity of this tax.

As already indicated, the argument of plaintiff in error ignores the valuable contractual rights the Railway Company has with the various street car lines, by virtue of which the Railway Company, instead of operating a small, trifling, independent unit on the

bridge itself, becomes a part of an interurban railway system, and necessarily secures, on that account, an enormous value. It is readily conceivable how much income value is derived by the Railway Company from the fact that all of the street car lines of these other systems bring its passengers to the bridge from all directions and enable them to cross the bridge without inconvenience and without changing cars, and without the opportunity to go through the mental operation as to whether or not they will ride or walk across the bridge. Without this contract and working arrangement, it is readily conceivable that the said connecting street railway systems involved in this contract might arrange to divert all of their passenger traffic to and across one of the other bridges over the Mississippi River.

There is nothing in the Federal Constitution preventing property in Missouri from being taxed even though it is so used in interstate commerce and even though a greater part of its value accrues, because of its use in interstate commerce and because of its use in connection with other property so used. The prohibition is against levying a direct tax upon the right to do such business or upon the rights derived therefrom or in making a payment of a license tax a condition precedent to doing such business, or in making an unreasonable assessment disproportioned to the property in the state.

In Henderson Bridge Co. v. Kentucky, 166 U. S. 151, this court said with reference to similar taxation against a bridge across the Ohio River:

> "The Company was chartered by the State of Kentucky to build and operate a bridge, and the state could properly include the franchises it had granted in the valuation of the Company's property for taxation. * * *"
>
> "The acts of Congress conferred no right or franchise on the Company to erect the bridge or collect the tolls for its use. They merely regulated the height of bridges over that river the width of the spans, etc. * * *"
>
> "The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky."

In the Norwood case (St. Louis etc. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 352), this court said that if the taxes were "not imposed **because** of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property **valued with reference to the use in which it is employed,** they are not open to attack".

In the brief of plaintiff in error it seems to be conceded (p. 35), first, that the bridge structure is a proper subject of taxation, although used in interstate commerce; second, that if the bridge and the railway across it were both owned by the same com-

pany that both would be proper subjects of taxation although both are engaged and used in inter-state commerce, but it is insisted that a distinction arises when the ownership is separated as where the owner of the bridge leases to another the right to use the bridge and that in such case a tax upon the lessee using the bridge would be bad, as a burden upon interstate commerce. And it is claimed that the tax is upon an instrumentality of commerce, namely, the use of the bridge.

This position is objectionable because it is not warranted by either the facts or the law.

As to the facts: It has already been shown that the right to use the bridge was not the only intangible property owned by the Railway Company, and, therefore, the tax on "all the property" could not have been based alone upon the use of the instrumentality, but must have been based also upon its other intangible property and the contract rights with two other street railroads which gave greatly increased value to its property, and the record shows (Tr., p. 20) that the Board of Equalization "heard all of the evidence in relation to the same", and this board is presumed to have done its duty.

As to the law: In the Backus case (154 U. S. 439) Judge Brewer effectively disposed of this contention of plaintiff in error:

"There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determined the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. * * *

"Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine **how much of that value springs from its use in doing interstate business** and how much from its use from doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. **Take, for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio, between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation?** Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value?"

This subject is further discussed at pages 46-53.

If in the Henderson Bridge case cited by plaintiff in error (166 U. S., 150) both the bridge and its use were properly taxed because not separable, and if in the Backus case (154 U. S., 439) the use of property could not be separated from the property itself used in interstate commerce (Ill. Brief of Pltff. in Error, p. 39), why should we seek to separate the value of the various intangibles in this case, as they are peculiarly inseparable and as it is impossible to determine how much of value is given by any one intangible or even whether the use of the bridge is included in the tax. As Judge Brewer said in the Backus case (154 U. S., 439) the State "is not bound to enter upon a disintegration of values * * * and determine how much of that value springs from its use in interstate commerce."

The Franchises of a Railroad Include All of Its Intangible Property and Are Properly Taxable by a State Even Though Used in the Business of Interstate Commerce.

The term "franchises" has been used with different meaning and with different effect in statutes of various states and in the opinions of the courts. The Missouri statute (Sections 11551-2, R. S. Mo. 1909) in effect defined the franchises of railroads and other public-service corporations as the intangible property of the corporations and required that the valuation be entered on the assessment lists under the head of "all other property." There is the constant suggestion in our opponent's brief that the term franchises in this case is limited to right of this Railway Company to engage in interstate commerce on the bridge. However, there is no question that the Missouri statute required that the assessment of all the intangible property be made under the head of "all other property," and that the franchises of the railroad be included. In **St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350,** this Court, speaking through Mr. Justice Pitney, said:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided, at least, the franchise is not derived from the United States."

In **Branson v. Bush, 251 U. S. 182,** on a question of special taxation, this Court considered the taxation of a railroad's property where it was claimed that an added value was given by the "franchise" of the railroad. Mr. Justice Clarke, speaking for the Court, said:

> "It is not easy to define just what is meant by the 'franchise' of a railroad company 'other than the right to be a corporation,' and the record does not attempt a definition (Morgan v. Louisiana, 93 U. S. 217, 223). The record is also silent as to what, if any, value was placed upon the franchises of the company here involved by the state tax commission, and as to what extent, if at all, they were 'considered' in arriving at the assessment objected to, and, therefore, it is contended that the conclusion of the circuit court of appeals that personal property value was included in the assessment of the real estate of the district had no foundation on which to rest, other than the assumption that the tax commission conformed to the law and 'considered' the franchises when assessing the real estate, and that this necessarily resulted, in fact, if not in form, in such inclusion—an unusually meager basis, surely, for invalidating a tax of the familiar character of this before us."

Judge Bond, who delivered the opinion of the Supreme Court of Missouri in this case, gave an interesting discussion of the meaning, value and taxability of railway franchises (Tr., p. 63):

"Appellant insists that the tax assessment is illegal because the defendant owns no railroad franchises except the franchise to be a corporation, which is a non-taxable one. This is a misconception. The defendant does own railroad franchises other than that implied in that of a grant of a charter to it. It possesses, by the terms of its charter, the right to contract and operate a railroad. The bridge over which its track is laid is, in a general sense, a public highway. Under the constitution of this state its right to operate its street railway over the public highway (the bridge) could only be exercised by the consent of the local authorities having control of the highway proposed to be occupied by such street railway (Const., Art. XII, sec. 20). When it obtained this permission to operate its street railway on this public highway for fifty years the legislative grant instantly became effective and vested in appellant a valuable franchise wholly distinct from its franchise of artificial entity (State ex rel. v. Railroad, 140 Mo., l. c. 549), and one which is specifically assessable for taxation under the terms of the statutes providing for taxation of franchises (State ex rel. v. Wiggins Ferry Co., 208 Mo. 622). Proceeding under these statutes, and in accordance with the method prescribed in a subsequent section (11559, R. S. 1909), the board of equalization assessed and adjusted the taxes laid on defendant's franchises on a mileage basis, and after the hearing of evidence, and in so doing it arrived at the conclusion that the value of the intangible property of defendant in Missouri was $173,000.16. It

referred to this specific assessment as one made on 'all other property' of defendant, a method of distinguishing the various items approved in State ex rel. v. Wiggins Ferry Co. (208 Mo. 622). In the present case, as has been seen, the franchise to operate a railroad resting primarily in legislative grant, became consummate when the consent to occupy the bridge for that purpose was obtained, for then it ripened into a legislative privilege and fell within the correct meaning of the term 'franchise,' which implies a privilege conferred by law to do that which 'does not belong to the citizens of the country generally as a common right' (12 R. C. L. 173, sec. 1 et seq.; State ex rel. v. Weatherby, 45 Mo., l. c. 20). According to the agreed facts this franchise vested in appellant was a practical monopoly with a possible life of fifty years."

In the Taxation of a Railroad it Must Be Considered in Its Entirety as a Single Property and Not Separated Into Its Various Constituent Elements.

A railroad is necessarily made up of all of its properties. The Railway Company in this case owns and operates a railroad, which, for purposes of taxation, must be considered in its entirety. There can be no question that the property of the plaintiff in error is a railroad and is operated as such. Just what constitutes a railroad was defined by the Supreme Court of Missouri on a construction of the Missouri

statutes relating thereto in State ex rel. v. Wiggins Ferry Company, 208 Mo. 622, where the Court held that the Ferry Company was operating a railroad, although it had only three miles of tracks in Missouri which were used for sidetracks, storage and transfer as a connecting link with other lines. The Court held that under the statutes of Missouri it was not essential that a railroad should own rolling stock or even the control of the road's operation, and that under the statute all railroads and all other property, real, personal or mixed, owned, hired or leased by any railroad company or corporation in this state shall be subject to taxation. The Railway Company was incorporated as a railroad corporation in Missouri and all of the property, contracts and rights which enabled it to operate its railroad gave it its value. There is no reason why its "intangibles" and franchises should be separated for the purpose of taxation, particularly as the statute provided that all such intangible property should be taxed merely as "all other property". Its contract or lease of the surface of the Eads Bridge, giving it an exclusive monopoly to operate a street railroad over that highway for possibly fifty years cannot be separated from its contract with the two other railroads for the operation of its line and for the furnishing of power, cars, crews, terminals and equipment in consideration for a certain division

of the receipts without the investment of capital therefor. The value of the operating contracts is apparent. The same cars with the same motorman and conductor continued on into East St. Louis, and some of them on into distant points in Illinois. The fare charged over the bridge was ten cents for a single ride either way. Persons desiring to cross the bridge and also into Illinois "without change of cars" at the east end of the bridge, were sold coupon tickets at various prices, depending upon the route and distance traveled. The fare collected for the different companies was kept distinct by these coupon tickets.

All of the advantages accruing to passengers boarding the cars of the Railway Company on the Missouri side accrued immediately on their getting on the cars, as they then possessed the right of remaining on and without changing cars after reaching the end of the tracks of the plaintiff in error to continue their journey into and through East St. Louis and other points in Illinois.

The physical characteristics of the Railway Company were the same throughout its entire length, as were also its intangible properties, and the Railway Company was able to confer identically the same privileges on its passengers in Illinois and Missouri.

The Board of Equalization in Taxing "All Other Property" of the Railroad Presumably Included Only Its Taxable Intangible Property, and the Law Presumes That the Board Did Its Duty in Accordance With the Statutes.

The so-called "franchise" to run on the bridge is only a part of the Railroad and comprises only a part of its intangible property.

The Board of Equalization fixed the value of the tangible property of the Railroad Company located in Missouri strictly in accordance with the provisions of **Section 11559**, Revised Statutes of Missouri 1909, where it is provided that if a railroad extends beyond the limits of this state into another state, the board shall assess and adjust the taxes on a mileage basis. **The same section also provides that the board in making its assessment "may arrive at its finding, conclusion and judgment upon its knowledge, or such information as may be before it, and it shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the board may think it is entitled to."**

The record in this case does not disclose exactly what information or testimony was before the Board of Equalization, or exactly upon what knowledge it based its conclusions and findings, but **it does appear**

that the board "having heard all the evidence in relation to the same", by unanimous vote, fixes the distributable value per mile, of the rolling stock, roadbed and superstructure, and "all other property", etc (Tr., p. 20), and followed accurately the provisions of section 11552 in arriving at the value of the intangible property in Missouri. The value of this intangible property in Missouri was put under the classification of "all other property", and was fixed at $173,000.16.

The agreed statement of facts (Tr., pp. 15-35) sets out many facts which may have been included by the Board of Equalization in "the evidence in relation to the same", and on page 35 of the transcript the following appears in the agreed statement of facts:

> "The State Board of Equalization held stated meetings for consideration of the valuation and assessment of railroad, bridge, telegraph and telephone property for the taxes of 1907, of which due notice was given to the officers of such companies, including defendant. The defendant, through its president, Mr. L. C. Haynes, appeared before the board at one of said meetings, to wit, on June 7th, 1907, and was heard in relation to the valuation and assessment of the property of the defendant company for the taxes of 1907."

We are justified, therefore, in stating that the Board of Equalization actually heard "all the evidence in relation to the same" before fixing the value

of the intangible property of this defendant, and that the board undoubtedly heard and learned all of the working and operating contracts which the plaintiff in error had with the East St. Louis Electric Street Railroad Company and the East St. Louis & Suburban Railway Company.

The lower court thus stated the law (Tr., p. 44):

> "But the board is not required to classify or describe property assessed other than it is classified and described by statutes, and a substantial compliance with the statute or a classification and description based upon statements furnished by the taxpayer is sufficient."

In State ex rel. Hammer v. Wiggins Ferry Co., 308 Mo. 622, the question arose as to the nature of the intangible property in Missouri owned by the Wiggins Ferry Company, and it was contended that the tax on the item assessed as the value of "all other property" was a tax on the franchise of the Ferry Company and also that it was a tax on interstate commerce. The evidence there, as here, was rather meager in showing just what evidence and facts were before the Board of Equalization and came to the knowledge of the board as it fixed this assessment. Judge Fox said:

> "From an examination of the entire record, owing to the meagerness of the evidence upon

that question * * * it is extremely difficult for us to ascertain and determine what the finding of the court was upon that point.

"The appellant's oral evidence, while very meager, tends, however, to prove that 'all other property as $30,000,' mentioned in the assessment, was an assessment against the railroad in question for the right and privilege of constructing, maintaining and operating the road in this state in connection with its right to conduct its business wherever the system of lines belonging to the three combined companies extended; all representing a unity of use in the entire corporate property of the three corporations, thereby making the same much more valuable than it otherwise would be for use separately and independently of each other."

It will be observed that in this case, quite similar in its facts, the Court indicated that the combined use of the three roads gave each an added value.

In **Illinois C. R. Co. v. Greene, 244 U. S. 555-563**, the claim was made that treasury securities and terminals situated in other states were taxed. As to the terminals the Court held "that since it did not appear but that the board made due allowance on account of them, it must be presumed that they did make such allowance". As to the treasury certificates the Court held "that it did not appear but that the board had given proper consideration to them".

The gross receipts of the plaintiff in error from all sources for 1907 (Tr. p. 34), were $165,959.47 and operating expenses, $99,575.68; for 1906, were $142,279.30 and operating expenses, $85,367.68; for 1905, were $127,807.18 and operating expenses, $76,684.31; for 1904, were $142,183.72 and operating expenses, $113,192.38; for 1903, were $116,348.02 and operating expenses, $69,808.81; for 1902, were $72,674.14 and operating expenses, $24,224.76, and from 1902 to 1907, the bonded indebtedness was $500,000—on which it paid 5 per cent interest, and regular dividends were paid on the stock of $500,000. In 1902, the capital stock was increased from $250,000 to $500,000, and in the same year the bonded indebtedness was increased from $75,000 to $500,000. In the agreed statement of facts (Tr. p. 19) it appears that (with exception of the money on deposit) "the defendant had and used in the State of Missouri as aforesaid, the same identical property that it so had and used on June 1, 1897, and June 1, 1906," yet the agreed facts show that in ten years, additional bonds and stock to the value of $675,000 were issued and that interest and dividends were paid on the increased issue, although the company had the same identical property during the entire period.

It therefore appears that although the plaintiff in error admittedly made no change in its assets in the ten-year period from 1897 to 1907 (the

year of this taxation), and had the same cars, tracks, trolley poles and wires, and its gross receipts during that entire period were largely in excess of its expenses, and never failed to pay interest on its bonds or dividends on its stock and had not acquired any new property during that period, that nevertheless it did in 1902, increase its capital stock from $250,000 to $500,000 and increased its bonded indebtedness from $75,000 to $500,000. This increase necessarily represented earned surplus. With all of this evidence before the Board of Equalization (and we can assume that it was equally available to the board as to us) and with the president of the defendant road himself before the Board of Equalization at the time this assessment was made (Tr. p. 35), who "was heard in relation to the valuation and assessment of the property of the defendant for the taxes of 1907" **it can readily be understood how and why the Board of Equalization came to assess the value of the intangible property of the company in Missouri at $173,000.**

The Unit Rule of Taxation as Applied to Intangible Property Used in Interstate Commerce.

While the validity of this rule is conceded by the brief of plaintiff in error, we will briefly consider this rule in its application to the taxation of intangible property used in interstate commerce. It was said by Mr. Justice Holmes in Fargo v. Hart (193 U. S. 491-500):

> "So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable."

There can be no question that the different parts of this Railway Company are "about equal in value".

The unit rule of taxation has been upheld by this Court in regard to railroads, telegraph companies, sleeping car companies and refrigerator car companies (Kentucky Railroad Cases, 115 U. S. 321; Western Union Tel. Co. v. Atty-Gen., 125 U. S. 530; Pullman's Palace Car Co. v. Penn., 141 U. S. 18; American Refrigerator Co. v. Hall, 174 U. S. 70).

The tax in this case is measured solely by reference to the property situated wholly within this state. There was nothing in the Illinois portion different from the part in Missouri. It is enough for the state that it finds within its borders property that is of a certain value. What has caused that value is imma-

terial. It is protected by state laws and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state. This railroad was peculiarly of like character and value throughout its entire length and the mileage or proportionate basis furnished an unusually fair measure for taking the value of both the tangible and intangible property in Missouri.

One of the most recent and instructive cases on this subject is **St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350.** The Arkansas statute imposed an annual franchise tax upon railroad corporations within the state, the amount being measured as here by reference to the property of the corporation within the state and used in business transacted within the state. This Court held that the controlling test is to be found in the operation and effect of the law as applied and enforced by the state and that:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided, at least, the franchise is not derived from the United States. * * *
>
> "Property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on ac-

count of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. * * *

"By whatever name the exaction may be called if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. * * * **This, however, does not mean, as is contended, that because of the Fourteenth Amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce.** * * * It is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445."

The paragraph in bold-face type (ours) completely answers and negatives the point relied on by plaintiff in error.

The questions that interest us in the case at bar were brilliantly discussed by Mr. Justice Brewer in the leading case of **Cleveland etc. R. R. v. Backus, 154 U. S. 439.**

At page 444 Judge Brewer said:

> "Now, when a road runs into two states, each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states, and to that a division of the value of the entire property upon the mile-

age basis is the legitimate answer. Taxing a mileage share of that in Indiana is not taxing property outside of the state. * * * **The value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put.** In the nature of things, it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine **how much of that value springs from its use in doing interstate business** and how much from its use from doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. Take, for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio, between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burdent of state taxation? Will it be said that the taxation must be based simply on the cost, when

never was it held that the cost of a thing is the test of its value? * * *

> **"It is enough for the state that it finds within its borders property that is of a certain value. What has caused that value is immaterial. It is protected by state laws and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what can be done directly—that is, to cast a burden on interstate commerce."** (Bold-face type ours.)

Mr. Justice Brewer made very plain that it is the use of the instrumentality that gives property a value, and that there is no pecuniary value outside of that which results from the use, and even if that value springs from its use in interstate commerce, it cannot on that account be relieved of taxation.

A proper discussion of this subject demands a review of the case of **Adams Express Co. v. Ohio State Auditor, 166 U. S. 215.** That case involved the taxation in Ohio of the intangible property of an express company doing an interstate business. In the course of his opinion, Mr. Justice Brewer said:

> **"It matters not of what this intangible property consists—whether privileges, corporate franchises, contracts or obligations.** It is enough

that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. * * *

"Take the Henderson Bridge Company's property, the validity of the taxation of which is before us in another case. The facts disclosed in that record show that the bridge company owns a bridge over the Ohio between the City of Henderson in Kentucky and the Indiana shore, and also ten miles of railroad property in Indiana; that that tangible property, that is, the bridge and railroad track, was assessed in the States of Indiana and Kentucky at $1,277,695.54, such, therefore, being the adjudged value of the tangible property. * * * As mere bridge and tracks, that was its value. If the State's power of taxation is limited to the tangible property, the company should only be taxed in the two states for that sum, but it also appears that it, as a corporation, had issued bonds to the amount of $2,000,000, upon which it was paying interest; that it had a capital stock of $1,000,000, and that the shares of that stock were worth not less than $90 per share in the market. The owners, therefore, of that stock had property which, for purposes of income and purposes of sale, was worth $2,900,000. **What gives this excess of value? Obviously the franchises, the privileges the company possesses—its intangible property.** * * *

"Suppose such a bridge were entirely within the territorial limits of a State, and it appeared that the bridge itself cost only $1,277,000, could be reproduced for that sum, and yet it was so

situated with reference to railroad or other connections, so used by the traveling public, that it was worth to the holders of it in the matter of income $2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of $2,900,000, can there be any doubt of the State's power to assess it at that time, and to collect taxes from it upon that basis of value?

"* * * **The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.**

"* * * **But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done.**" (Bold-face type ours.)

In **L. & N. R. Co. v. Greene, 244 U. S. 522**, where the Kentucky statute relating to the taxation of the intangible property of an interstate railway company was one of the questions in issue, the Court said (p. 546):

"Any excess of tangibles, without or within the state, properly may be given its due weight as a factor modifying the tentative result reached by mere mileage apportionment. In the absence of special circumstances, this is not of itself necessarily an unjust method of apportioning such a tax. • • •

Page 548:

"This, we repeat, does not necessarily result in including in the Kentucky franchise valuation tangible or intangible property not located within that state. It does permit the Kentucky officials to take into consideration extra-state tangibles, as well as intangibles, constituting portions of the unit of which they are valuing a part. This is permissible, even in applying the statute to nonresident corporations.

"It is settled that total stock or total assets situate partly within and partly without the state, but organically related, may be taken into consideration as a means of reaching the true cash value of property within the state, and that the mileage relation may be given its proper weight."

A summing up of the decisions of this court indicates complete approval for the taxation by a state of the property within the state on the mileage basis, according to the unit rule of the intangible property of a railroad, even though used in in-

terstate commerce, and though part of the intangible property is a franchise or contract enabling it to conduct an interstate commerce such as the operation of this railway across the Eads Bridge.

Discussion of Some Cases Cited by Plaintiff in Error.

An analysis of the cases cited by plaintiff in error will show, first, that the method of taxation adopted in the present case and the method of fixing the value of the intangible property has never been disapproved; and, second, that such taxation is not a burden on interstate commerce; and, third, that the principles laid down in most of these very cases uphold the present tax.

The case of **Louisville etc. Ferry Co. v. Kentucky,** 188 U. S. 388, and other like cases cited by plaintiff in error are thus distinguished in Hawley v. Malden, 232 U. S. 1, at 11:

> "But these decisions do not involve the question of the taxation of intangible personal property, nor do they apply to tangible personal property, which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere."

In the case of **Fargo v. Hart,** 193 **U. S. 488** it was properly held that personal property outside the state and unnecessary to the express company's actual busi-

ness cannot be included in fixing the value, for taxation, of property within the state on a mileage basis, when the resulting assessment is greatly in excess of the value of the property in the state. In his opinion Mr. Justice Holmes declared the very principle for which we now contend, and said:

> **"The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system."**

In the case of **Galveston etc. Ry. v. Texas, 210 U. S. 216**, the tax levied was "equal to 1 per cent of their gross receipts" derived from interstate business, as well as business done within the State. In his decision in this case Mr. Justice Holmes distinguished Maine v. Grand Trunk, 142 U. S. 217, where the gross receipts were made a mere measure of the value of the property, and the case of Philadelphia etc. S. S. Co. v. Pennsylvania, 122 U. S. 326, where the tax was frankly based upon the gross receipts derived from interstate commerce, as in the Galveston case, and then says:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to

attack as inconsistent with the Constitution. * * * The State must be allowed to tax the property, and to tax it at its actual value as a going concern. * * * When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulations than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account."

In the case of **Wallace v. Hines, 253 U. S. 66**, the case was before the Court on the demurrer of the State Tax Commissioner to the bill of the railroad asking for an injunction against the enforcement of the tax, and the Court was limited for the facts to the allegations of the railroad's bill. The bill showed quite plainly that the mileage basis of assessment against the part of the railroad in North Dakota was unfair in this case in view of the fact that North Dakota is a state of plains, and that the cost of building railroad tracks there was much less than in mountainous regions in the other states that the road had to traverse; that there were not great or valuable terminals in North Dakota, while there were many such in other states, so that the mileage basis would subject the part of the road in North Dakota to an unfair assessment. It also appeared that the road owned bonds secured by mortgage of lands in other

states, and also land grants in other states, and other property elsewhere which had no relation whatever to the part of the railroad in North Dakota. Nothing of that sort is true in the case at bar.

The case of **Union Tank Line Co. v. Wright, 249 U. S. 275**, relied upon by plaintiff in error, asserts no new doctrine and is clearly distinguishable from the cases establishing the unit rule. The State of Georgia undertook arbitrarily to assess a certain proportion of the entire value of the tank cars owned by the Tank Line Company, a foreign corporation, not on the basis of the proportion of tank cars actually used in Georgia, but on another basis having no relation to the value of the average number of tank cars within the State during the year. The Tank Line Company had no franchise in Georgia and no intangible property there. The Court said:

> "A state may not tax property belonging to a foreign corporation which has never come within its borders. * * * In so far as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce."

This case, therefore, lends no aid to plaintiff in error, as in the case at bar the assessment objected

to was upon "all other property" than the tangible property, namely, upon the franchises and intangible property. It is of interest that Mr. Justice Day concurred only in the result in this case and that three of the justices dissented from the majority opinion on the ground that it was a departure from the rules of apportionment in taxation theretofore sanctioned by this Court.

The **Gloucester Ferry case (114 U. S. 196)** was similar to the North Dakota case (Wallace v. Hines) and Fargo v. Hart, where the principal assets were in another state. In that case the Ferry Company owned real estate and personal property in New Jersey and all of its tangible property was in New Jersey and its boats were registered there and stayed there except on trips to Philadelphia to discharge and receive passengers. It had no tangible property in Pennsylvania and had nothing there except a lease on a landing place, and yet it was arbitrarily taxed in Pennsylvania on one-half of its entire capital stock, on the theory that one-half of its property was located there, which was not true. However, Mr. Justice White, in his dissenting opinion in the Henderson Bridge case (166 U. S. 151, 169), said that the majority opinion in that case had substantially overruled the opinion in the Gloucester Ferry case.

In **Cudahy Packing Co. v. Minnesota, 246 U. S. 450,** it was insisted that the tax was based upon gross earnings derived from interstate commerce, because the value for taxation was determined from the gross earnings, but this Court held that this tax was valid. In discussing the question, Mr. Justice Van Devanter said:

> "If what is done is to reach the property, and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; * * * The state is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on property, taken as its real of full value."

CONCLUSION.

The tax in this case was clearly measured by and made defendant in fact upon the value of the property in Missouri, and was assessed like any other tax on property. The intangibles included other property than the contract for the use of the bridge, and were taxed as "all other property" by the Board of Equalization after hearing all of the evidence in relation to their value. The items included were not named or separated. The board is presumed to have done its duty and to have followed the law, in view of the evidence before it. There is nothing to indicate any invalidity in the tax from any point of view. The right of a State to tax property found within its border is coupled with a duty to afford protection to such property through its governmental agencies. The property of the defendant in Missouri is safeguarded and under the protection of the law and governmental agencies of this State.

As was suggested by Mr. Justice Brewer in the Adams Express case, accumulated wealth would laugh at the crudity of taxing laws that would reach only the tangible property and ignore the intangible, while the intangible property was what gave the real value to the entire property as a whole.

Therefore, as the tax in this case cannot be distinguished in its essentials from similar taxes sustained by this Court in a large number of cases, we respectfully maintain that the judgment of the Missouri Supreme Court should be affirmed.

THOMAS G. RUTLEDGE and
J. M. LASHLY,

Attorneys for Defendant in Error.

cern was due to exclusive rights on the bridge and lucrative traffic arrangements resulting from private contracts with other companies, which must have been considered by the taxing authorities in making the valuation. P. 316.

279 Missouri, 616, affirmed.

THIS was an action by the State of Missouri to collect a tax levied on the property of the plaintiff in error railway company. The state courts, including the court below, sustained the tax. The facts are stated in the opinion.

Mr. Joseph S. Clark, with whom *Mr. William E. Garvin* was on the brief, for plaintiff in error.

Mr. Thomas G. Rutledge, with whom *Mr. J. M. Lashly* was on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as the Bridge Electric Company, a corporation organized under Missouri law, was the owner in 1906 of 865–1000ths of a mile of electric railway, constructed upon and extending from the easterly to the westerly end of the Eads Bridge over the Mississippi River at St. Louis. In that year the State Board of Equalization of Missouri valued the portion of this railroad which was within that State at $186,019, and levied a tax upon it for state and local purposes, which the plaintiff in error refused to pay, and thereupon this suit was instituted to recover the amount of the tax.

The case was tried on an agreed statement of facts and the State prevailed in all the state courts. Only one of the several defenses relied upon in the answer has been argued in this court, viz., that the tax is invalid because, if allowed, it would constitute a direct and unconstitutional burden on interstate commerce.

The state statute provided that in valuing railroads for taxation the State Board of Equalization should determine the total value of the entire property in the State, tangible

and intangible, of each company, and that from this total it should deduct the value of all its tangible property and then "enter the remainder upon the assessment list . . . under the head of 'all other property.'" Laws of Missouri, 1901, p. 232, § 2.

Complying with this statute the Board of Equalization valued all of the rolling stock, poles, wires and cash of the Bridge Electric Company at $32,630 per mile; the roadbed and superstructure at $5,000 per mile, and "all other property" at $500,000 per mile, making a total value per mile of $537,630.

There were .346 of a mile of the track in the State of Missouri and this proportion of the total value per mile, amounting to $186,019 (of which $173,000 was included under the item "all other property"), was the amount on which the disputed tax was levied.

The unit rule thus adopted by the Board of Equalization has long been a familiar method, often approved by this court, for valuing interstate railroad properties. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus*, 154 U. S. 439, 445; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Branson* v. *Bush*, 251 U. S. 182.

It is not contended that this valuation is unreasonable in amount, but only that the property of the company, which was valued as "all other property," consisted solely of its franchise to conduct interstate passenger traffic over the interstate bridge and that therefore the tax, so far as levied on the valuation placed on that property, is a direct tax and burden on the right to engage in interstate commerce and that it is, for this reason, unconstitutional.

But the stipulation on which the case was tried does not sustain this contention.

This stipulation shows that in 1902 the Bridge Electric Company acquired by contract with the Terminal Railroad Association of St. Louis the exclusive right to operate an electric railroad over the Eads Bridge for the term of

fifty years, (for passenger traffic only and for a part of the fare to be charged) and that in the same agreement it entered into a written contract with two other electric railroad companies for the recited purpose of causing all passenger traffic originating on the lines then or thereafter controlled by them to pass over the Bridge Electric Company's road. Of the two latter companies thus contracted with, one operated extensive lines of electric street railroad in the City of East St. Louis, in Illinois, and the other operated an extensive system of suburban electric railways in Illinois. Both of these Illinois systems connected with the Bridge Company's track at the easterly end of the bridge.

Later in the same year, 1902, the Bridge Electric Company entered into another agreement by which the company operating lines in East St. Louis contracted, for a percentage of the fares to be collected for transportation over the bridge, to furnish the cars, crews and equipment for carrying, and to operate the cars necessary to carry, all passengers across the bridge, without change of cars. Coupon tickets were to be issued to passengers traveling either way across the bridge and other conveniences were provided for the purpose of increasing the bridge traffic.

It is apparent that the large value which it is conceded this street railroad had was derived, not from its mere franchise to do an interstate business, but from the exclusive right which we have seen the company acquired by private contract to operate over the Eads Bridge, a public highway, and from the other rights also derived from private contract which made its line of track a part of two Illinois systems of railway and gave it a profitable operating arrangement with them. It was these contracts which gave the company's small extent of physical property an earning capacity, and therefore a value, which enabled it to pay from their date in 1902 to the date of the disputed assessment five per cent. annual

interest on $500,000 of bonded indebtedness and an annual dividend of about three per cent. on an equal amount of capital stock.

The law applicable to the state of facts thus developed was summarized in *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, in a form which has been frequently approved by this court, notably in *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 365. Slightly condensed it is that, while a State may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, yet this immunity does not prevent the State from imposing an ordinary property tax upon property having a situs within its territory and employed in interstate commerce. Even the franchise of a corporation, if not derived from the United States, although that franchise is the business of interstate commerce, is subject to state taxation as a part of its property.

The record does not show what the specific items were which entered into the consideration of the Board of Equalization in valuing "all other property" of the Bridge Electric Company, but it appears from the stipulation that the president of the company was heard with respect to the valuation and assessment of all of its property, and we cannot doubt that the contracts we have described, which very plainly gave to this short line of railway much of the value as a going concern which led the company to bond and capitalize it at $1,000,000, and the Board to value it at approximately one-half that amount, must have been taken into consideration by the Board, and that, therefore, the contention that the tax was levied exclusively upon the franchise to do an interstate business is not sound and must be rejected.

It results that the judgment of the Supreme Court of Missouri must be

Affirmed.

ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY *v.* STATE OF MISSOURI AT THE RELATION AND TO THE USE OF HAGERMAN, COLLECTOR OF THE CITY OF ST. LOUIS, IN THE STATE OF MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 261. Argued March 23, 1921.—Decided May 2, 1921.

A street railroad company whose tracks crossed and were confined to a bridge between Missouri and Illinois, was taxed, under Missouri Laws of 1901, p. 232, by valuing its rolling-stock, poles, wires, cash, road-bed and superstructure as such, adding a reasonable valuation of "all other property," and assigning due proportions to Missouri as the basis of the tax. *Held*, that the tax could not be regarded as a direct burden upon the company's franchise to conduct its interstate traffic over the bridge, upon the ground that the "other property" valued consisted solely of that franchise, since it appeared that much of the value of the railway as a going con-